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TERM NO. 14

STATE OF ILLINOIS APPELLATE COURT FOURTH DISTRICT MAY TERM, A. D. 1940

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AGENDA NO. 8

J. B. WILLIAMS

VS.

T. J. MOSS TIP -Appellee Appeal fro

Circuit Court

St. Clair County, Illinois

307 I.A. 233

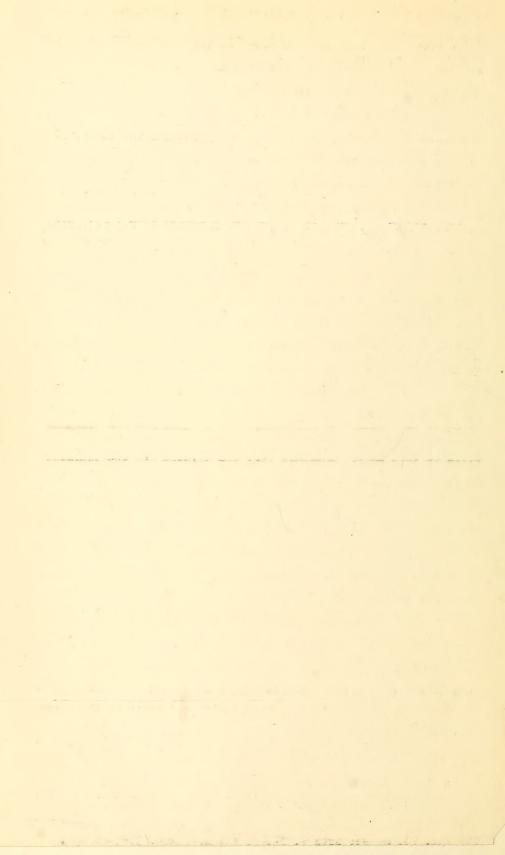
STONE, P. J.

Appellant (hereinafter designated as Plaintiff) prosecutes his appeal to this Court from an adverse verdict and judgment rendered in the Circuit Court of St. Clair County, in which plaintiff sought damages for injury to his personal property by reason of a fire alleged to have been communicated by sparks from a st m engine, the property of appellee, (hereinafter designated as defendants).

The plaintiff leased and operated a farm immediately adjacent to the edge of defendant's property, where said defendant operated a tie yard. This was located near the city limits of East St. Louis, in St. Clair county. To haul the ties about the yard, defendant had constructed a narrow gauge railroad track, on which it operated tram cars loaded with ties and pushed by a "dinky" engine.

On plaintiff's farm was situated a barn. The distance from this barn to defendant's railroad track was controverted, the plaintiff's witnesses stating that there was a road between the railroad and the barn just wide enough for a wagon to pass through, while a witness testifying for defendant said it was about forty feet from the barn to the center of the track.

The evidence disclosed that there was a fire which consumed plaintiff's barn and a quantity of hay, corn and farm implements stored therein. Plaintiff's wife and daughter, and Mrs. Addie Mae Brooks, a friend, who was visiting plaintiff's home the day of the fire testified that they saw sparks and fire fly from the smokestack and that shortly thereafter grass and



trash around the barn were burning and the barn caught fire and was consumed. The witness, Mrs. Brooks testified there was nothing on the smokestack of the engine.

The testimony of the engineer, who testified for the defendant was in substance that as he approached the curve, near the barn, he shut off the steam and the trams and the engine coasted around the curve and passed the barn; that the engine did not throw out sparks, and on this particular occasion did not throw out sparks as it approached the barn of the plaintiff. He also testified that the engine was equipped with three antispark devices, viz., diagram, sheet screen netting and petticoat pipe, which were regularly inspected. The engineer further testified that on the morning in question there was a fire under a washing kettle between plaintiff's house and the barn, a distance of about twenty-five feet from said barn.

The cause was tried before a jury, which found the defendant not guilty. Plaintiff made a motion for a new trial, which was denied. Counsel for the plaintiff in their brief filed in this court, contends that the verdict and the judgment of the lower court is contrary to the law and against the manifest weight of the evidence; that the trial court erred in admitting certain evidence on behalf of defendant over objection of plaintiff, and that the trial court erred in refusing to give certain instructions to the jury offered by plaintiff and marked "refused" by the court.

The question of whether the fire was ignited by the engine was a question of fact for the jury, and the jury decided such question in the negative. The triers of fact evidently took into consideration the physical condition of the defendant's tie yard and the engineers testimony with reference to the spark arresting device and his further testimony that the engine did not throw out any sparks or fire as it approached and passed the barn. Where there is a contrariety of evidence and the testimony by a fair and reasonable intendment will authorize a verdict, even though it may be supported by a lesser number of witnesses, a court of review will not set it aside. Carney v. Sheevy 295 Ill. 78, at 83; Roth v. Flack, 224 Ill. App. 396, at 399.

Where a fair question of fact is raised by the proof this Court has consistently held that the jury's finding will not be set aside as against the manifest weight of the evidence. Summers v. Hendricks, 300 Ill. App. 498; Rich v. Albrecht, 300 Ill. App. 493; Jones v. Esenberg, 299 Ill. App. 551; Gregory v. Merriam, 294 Ill. App. 483; Rembke v. Bieser, 298 Ill. App. 136, at 146; Greenfield v. Terminal R. R. Co., 298 Ill. App. 147, at 153.

This court is of the opinion that the verdict of the jury was not contrary to the manifest weight of the evidence.

It is contended by the plaintiff that the court erred in the admission in evidence of defendant's Exhibit 1, which purported to be a rough sketch or plat of the physicial objects mentioned in the testimony. The witness Tebby, who drew it and who identified it, testified that it was approximately correct as to measurements but was not drawn to scale. This sketch was a mode adopted by the witness for locating and giving the relative situation of the various places about which he and the other witnesses were called upon to testify, and which it did not profess to be mathmatically accurate, it provided matter of description which was proper for the jury to consider in connection with the other testimony. It was not error to admit the plat in evidence. Brown vs. Galesburg Pressed Brick Co. 32 Ill. 648, op. 653.

Even if such plat were technically inadmissible, we are unable to see that its consideration by the jury could have wrought any prejudice to the defendant, certainly none that would justify a reversal. The People of the State of Illinois v. Steve Jarczak, 366 Ill. 507, op. 516; Harlan Gritton v. Illinois Traction, Inc. 247 Ill. App. 395, op 403; Edith S. Swency v. Northwestern Mutual Life Ins. 251 Ill. App. 1, op. 31; Ethel McClary v. Grand Lodge Brotherhood of R. R. Trainmen, 282 Ill. App. 77.

Plaintiff complains of the courts action in refusing to give two instructions requested by him which in substance advised the jury that if they believed from a preponderance of the evidence that there was a fire communicated to plaintiff's property by a spark from defendant's engine, then the fact that such fire was so communicated to plaintiff's property from defendant's engine should be taken as full prima facie evidence

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to charge the defendant with negligence which must be rebutted by the defendant.

It has been repeatedly held by our court that instructions containing adjectives emphasizing any duty, object or fact, are improper, as being calculated to confuse the jury. Molly vs. Chicago Rapid Transit Company, 365 Ill. 164; Teter vs. Spooner 305 Ill. 198; Leiserowitz vs. Fegarty, 135 Ill. App. 609.

In both of these instructions the word "full" is used, the plaintiff evidently having in mind the language of the statute, with reference to fires caused by locomotives of railroads. Chapter 114,Par. 96, Ill., Rev. Stats., 1939, provides, "That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as <u>full</u> prima facie evidence to charge with negligence the corporation or persons ******* There is no evidence that defendant owned or operated a railroad, under the general railroad laws of the State of Illinois.

It has been held that Section 12, article 11, of the Constitution of Illinois, which provides that "railways heretofore constructed or that may be constructed in this State, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law," refers to railroads constructed for public as contra distinguished from private use. - to railroads constructed and used as common carriers, and not to such structures built by individuals on their own lands, and to subserve their individual and private interests. Koelle vs. Knecht 99 Ill. 396. It necessarily follows that the "regulations prescribed by law," such as those in the R_ilroad and Warehouses Act, have no application to a private railroad such as that operated by the defendant merely as an incident to the business of creosoting ties. This court is of the opinion that the trial court committed no error in refusing to give these two instructions, which are almost identical.



We find no reversible error in this record and the judgment of the lower court will be affirmed.

AFFIRMED.



Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MAY TERM

A. D. 1940

OCT 28 1940 Davil 9 Mallett FOURTH DISTRICT OF ILLINGIA

TERM NO. 14

AGENDA NO. 8

J. B. WILLIAMS

Plaintiff-Appellar

vs.

IE COMPANY. T. J. MOS

Defendant-Appelle.

Appeal from the Circuit Court of

St. Clair County

307/13233

STONE, P. J.

Appellant (hereinafter designated as Plaintiff) prosecutes his appeal to this Court from an adverse verdict and judgment rendered in the Circuit Court of St. Clair County, in which plaintiff sought damages for injury to his personal property by reason of a fire alleged to have been communicated by sparks from a steam engine, the property of appellee, (hereinafter designated as defendants).

The plaintiff leased and operated a farm immediately adjacent to the edge of defendant's property, where said defendant operated a tie yard. This was located near the city limits of East St. Louis, in St. Clair County. To haul the ties about the yard, defendant had constructed a narrow gauge railroad track, on which it operated tram cars loaded with ties and pushed by a "dinky" engine.

On plaintiff's farm was situated a barn. The distance from this barn to defendant's railroad track was controverted, the plaintiff's witnesses stating that there was a road between the railroad and the barn just wide enough for a wagon to pass through, while a witness testifying for defendant said it was about forty feet from the barn to the center of the track.

The evidence disclosed that there was a fire which consumed plaintiff's barn and a quantity of hay, corn and farm implements stored therein. Plaintiff's wife and daughter, and Mrs. Addie Mae Brooks, a friend, who was visiting plaintiff's



home the day of the fire testified that they saw sparks and fire fly from the smokestack and that shortly thereafter grass and trash around the barn were burning and the barn caught fire and was consumed. The witness, Mrs. Brooks testified there was nothing on the smokestack of the engine

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The cause was tried before a jury, which found the defendant not guilty. Plaintiff made a motion for a new trial, which was denied. Counsel for the plaintiff in their brief filed in this court, contends that the verdict and the judgment of the lower court is contrary to the law and against the manifest weight of the evidence; that the trial court erred in admitting certain evidence on behalf of defendant over objection of plaintiff, and that the trial court erred in refusing to give certain instructions to the jury offered by plaintiff and marked "refused" by the court.

Counsel for defendant directs the attention of this court, however, to the fact that the errors assigned in the motion for new trial are not set forth in the abstract. The abstract filed by plaintiff merely contains what amounts to a notation to the effect that such motion was made, but does not set out the substance of such motion. In the absence of such errors assigned in the motion, being incorporated in the abstract, the defendant insists that there is nothing for review now before this Court, and request affirmance of the judgment of the trial court, for failure to file a sufficient abstract as required by the rules of



this court.

The abstract is the pleading of the parties in a court of review and whatever is sought to be reviewed must be contained in that pleading. People vs. Paul 167 Ill. App., 557; McGovern v. City of Chicago 202 Ill. App. 139. It has frequentbeen held by the courts of this State that, where a motion for new trial is filed, only such errors as are specified in such motion may be urged in this court on appeal (Graham vs. Dressen 292 Ill. App., 15, 23, 24; Gunderson vs. First National Bank of Chicago, 296 Ill. App. 111, 118) and where such motion is not set out in the abstract which is filed on appeal, none of the matters sought to be presented in the instant case are properly before this court for review by the court on appeal. Janeway vs. Burton 201 Ill. 78; McGovern vs. City of Chicago 202 Ill. App. 139, 144, 145; Retaj vs. Providers Life Assur. Co., 221 Ill. App. 459, 466, Meyers vs. City of Belleville, 304 Ill. App. 633. In the instant case the errors assigned in the motion for new trial are not set out in the abstract, and this court has no way of knowing the contents of the notion for new trial, without an examination of the transcript of record. In such event the court will not examine the transcript of record for the purpose of finding cause for reversal. Gage vs. City of Chicago, 211 Ill. 109, 112; Meyers vs. City of Belleville, 304 Ill.App. 633.

The plaintiff seeks a reversal and remandment of this cause, and apparently relies chiefly on matters pertaining to the weight of the evidence, error in refusing to give certain instructions requested by plaintiff and error in admitting certain evidence over the objection of plaintiff. Under the authorities hereinabove referred to and in view of the issue raised by defendant, this court is not in a position to disregard the rules of practice with reference to necessity for abstracting matters contained in the motion for new trial and pass on the questions not properly before us.

The judgment of the Circuit Court of St. Clair County will, therefore, be affirmed.

AFFIRMED.



41512

JACOB VONDRASEK, et al

RNARD YALS, et al., Appellants.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT,

307T.A. 234

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from two orders, one of August 22, 1940, which enjoined defendants from trespessing on plaintiffs' presises, and the other of August 24, denying the motion of defendants to vacate the injunction. The injunction was interlocutory and for the purpose of preserving the status. The motions were beard on the verified bill, a verified emendment to it and verified answers of defendants to the bill and the amendment.

The facts appearing from the pleadings, disregarding mere conclusions, appear to be that plaintiffs hold title by warranty deed to presises known as 6121-25 0. sentworth avenue in the Ulty of Chicago. The rear of these presides is improved by a warehouse four stories high, and the land in front of the warehouse is vacant. Adjoining these precises on the north is a lot improved by a gas station which is operated by defendants, sernard and "andel Tale, "rior to Hovember 1, 1939, a right-of-way across the vacant part of plaintiffs' premises was lessed to Mr. Adler, who then operated the gas station and who pald plaintiffs (25 per month for the privilege of permitting sustomers and Adler to drive across the presises, in other words, to use the same in obtaining access to and egress from the pas station. Adler's lease has expired. Defendants, who succeed Adler at the gas station, nevertheless, continued to use the provises of plaintiffs as a driveway without permission or lease and without paying compensation. Notice to discontinue these trespenses has been given by plaintiffs but has been disregarded not only by the Tales but by other defendants who upon the order of the false persist in using the land for the purpose of delivering expline to defendants. Defend128 E. W. J. 208 (... 1881)

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This is an appeal by entended from two orders, one of sugget En, 1860, miles enjoined betanker from troppealing on plain tiffs' premises, and the ether of sugget Es, senging the notion of defendants to receive the injunction. The injunction was interlocated defendants to receive the vertical bill, a vertical executant to it and reprised annual of defendants to the the till and the summannt.

The facts appearing from the visalings, discourse and conclusions, appear to be timt . I datiffy held title or encounty for Chlosops. The rear of these presides is ingreved by a mariouse four refer their and the land in front of the arrelegant to recent. Inis see any a well-correct self a of direct and no conferm oracle anished which is sperated by defendants, Sereral and raded tale, relar to mistria to Tra. Inserv out record to Tight a 1884 . I'm tag mis not seen when the inter, and then also the time in the is training of the real plaintiffs of or come for the salidate selfo al coming our to daily to drive consent the province in a little selfto vie the same in obtain; comes to and careas from an otation, where to have expland. Welenders, who receive the contents of the few charles, nevertheless, continued to was new or where of yay asono in the confidential principles from its form income and the fill in the confidence of the co - Luinii sat hus been disregarded not only by who lates hat by is jeine et reisrea pele: edf to robro edf nogr of-Land for Was gargett of Asiloret parallel to stepping policy and load

ante have also placed on the land owned by laintlife inc. tooks which they use for storing oil, etc.

The amendment to the bill alleges that plaintlift have and will continue to suffer irreparable injury unless an injunction lesues as prayed.

Briefs have been filed in this court and the cause was argued orally. In argument the title of plaintiffs and the tresponses by defendants and their sustemers were admitted. Defendants said they were willing to pay a reasonable amount for the use of the presides but had not been able to agree with plaintiffs as to that a reasonable sum would be. The answer also avers lackes and estimated as a defense because, as it is said, suit was not brought for nine months after the beginning of the tresposses. There is no marit to this contention.

Chicago ashingtonian long v. Chicago, 157 Ill. 414.

It has been argued the court was without jurisdiction because plaintiffs have a remedy at law by way of ejectment or foreible detainer. A suit of either kind, it is apparent, would not provide a complete and adequate remedy. The trespasses of defendants are continuing in their nature and whatever the law may have been in the past it is now settled that trespasses of a continuing nature in order to avoid a multiplicity of suits will be enjoined by a court of equity. Grass v. Levinson, 238 Ill. 69; O'Donnell v. Dearles, 291 Ill. 278 and Taylor v. Pearce, 179 Ill. 145. It was within the discretion of the court to hold matters in statu quo until a hearing could be had upon the scrits. Heater Johnson of the court to hold matters in statu quo until a hearing could be had upon the scrits. Heater Johnson of the court appealed from will be affirmed.

AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

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Chairm of Alexander Sec., Act (Principle)

MAHLON D. MILLER, doing business as Merchants Currency Exchange,

Appellee,

V.

APTRICAN IX CAT LINES, INC., UNITED STATES FILLITY AND QUARANTE CONTANY, J. RINGING, LAIL LEIDICH, INC., LAILA BLINKENPIA, CODROPOSITAN TRAVEL BUREAU, INC., GLUNN WRIGHT, JOURNEYS, INC., W. R. GRIFFITE, CENTRAL NATIONAL BANK IN CHICAGO AND MANUFACTURERS WATTONAL BANK OF DETROIT.

Defendants.

APPLAL FROM

CIASUIT COURT,

GOOK COUNTY.

AMERICAN EXPORT LINES, INC., and UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellants.

307 I.A. 2342

MA. PARBIDING JUTTICE O'CORNOR DELIVERED THE OPINION OF THE GOURT.

By this appeal the American Export Lines, Inc., and United States Fidelity and Guaranty Company seek to reverse a decree whereby it was ordered that plaintiff recover from defendant, Central mational Bank in Chicago, 11823.92 and further ordered that the cost of the suit be taxed against defendants, American Export Lines, Inc., United States Fidelity and Guaranty Company and Emil Leidich, Inc.

The undisputed facts are that March 10, 1936, defendant, Smil Leidich, Inc., of Detroit, Michigan, drew its check for \$1225.92 payable to the order of defendant, American Export Lines, Inc., on the Manufacturers National Bank of Detroit. The check was delivered to J. A. Menning, as general agent of the payee, American Export Lines, Inc. He endorsed the check: "Pay to the order of Journeys, Inc. American Export Lines, J. A. Menning, G. A." but did not get the money on the check until some eight or ten days later when it was paid to him by Journeys. Journeys endorsed the check to the Cosmopolitan Travel Dervice and afterward it was cashed by plaintiff, Miller, who was running a currency exchange business. He deposited it in his bank, the Central National Bank in Chicago, the check was paid in due course and he was given credit by the bank. Afterward the payee, American

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Of this eppeal the hearican layort Lines, Inc., and United States Fidolity and Survey Company seek to reverse a deope shereby it was ordered that plaintiff recover from Sefendant, search heticon. To was in Uniongs, 11223.32 and further ordered that the cost of the Sant in Uniongs, 11223.32 and further ordered that the cost of the Sant see Fidolity and Suarouty Conpany and hall heidich. The

 endorse the check and the bank charged "iller's account with the amount of the check. Afterward "iller brought this suit.

Counsel for defendants says: "The american export bines, defendant, is engaged in the business of operating a line of steam-ships between certain ports of the world for the transportation of passengers and freight and in connection with its said business maintained an office in the City of Chicago, which office, on March 10, 1938, and prior thereto, was in charge of defendant, J. A. Henning, as general passenger agent. Mr. Henning had authority to solicit passenger business for the company, and also authority to receive checks and currency and money orders in payment of reservations. He had authority to give the company's receipts for these checks or money orders. He issued the tickets in Chicago and signed them. *** "; that "Henning had no authority to endorse checks made payable to his employer."

There is is evidence a letter written by the employer to Henning dated April 28, 1937, in which Henning was told that any checks he received must be forwarded to his employer in New York.

The evidence further shows that at the time Henning endersed the check to Journeys the latter was in financial difficulty and about eight or ten days thereafter, when Journeys was in funds Henning received 11,000 in cash, a check for \$160.50 and a draft for \$50. Henning took the \$1,000 in each and the check for \$160.50 and bought an American Express draft payable to defendant, American Export Lines and forwarded the draft to it in New York City. Henning advised his employer, the American Export Lines, that he was sending this American Export Lines, that he was sending this American Express draft in payment of tickets for Ar. and Are. Levis Bennett. The evidence shows that some time prior he had been paid for the Bennett tickets but had failed to turn the money in to the conventy. We never reported to his employer that he had received the \$1233.92 from Leidich, Inc. in payment of tickets which he sold to Keydel and Auff. Afterward Henning's records were examined and a shortage of \$6,500.85 found.

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Defendants contend the evidence shows demains had no eatherity to endorse the check for 1223.92 which he received from belidien,
Inc. and therefore no recovery can be had in the instant case and
\$23 of the Segotiable Instrument Law, chap. 98, Ill. Lev. State. 1939
is cited. That section provides: "There a signature is forged or
made without authority, it is wholly inoperative, and no right to retain the instrument or to give a discharge thereof, or to enforce
payment thereof against any party thereto, can be acquired through or
under such signature, unless the party against whom it is sought to
enforce such right is precluded from setting up the authority or want
of authority."

There is considerable argument in the briefs and a number of authorities cited and discussed as to whether Menning had implied suthority to endorse the check considering the method in which he conducted the business of the American Export Lines. But we think it is unnecessary to pass on this question for we are of opinion that whether Menning had such authority is not controlling because the undisputed evidence is that Menning sent to defendant, his employer, \$1160.50 of the money he received from the check in question and obviously defendant to that extent was not damaged by Menning's endorsement and cashing of the check. The amount the Export Lines received was \$63.42 less than the amount it should have received from Menning but there is no suggestion that the Judgment for plaintiff should be reduced. In these circumstances the Judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McBurely, J., concur.

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Manchett, V., and Medarely, J., conour.

MASSACHUSTITS MUTUAL LIFE INSURANCE COMPANY, a Corporation, appellee, v.

WIGHAIL J. MAHLA, et al., Superal from Superal from Gook County.

DOROTHY SERRIN, Appellant. B 07 I.A. 235

MR. PRESIDING JUSTICE O'CORROR DELIVERED THE OFINION OF THE COURT.

By this appeal Dorothy Therwin, a judgment creditor of the mortgagors, seeks to reverse a decree of foreclosure.

December 8, 1938, plaintiff filed its complaint to foraclose the lien of a trust deed given to secure an indebtedness of .85,000. The Hanleys the mortgagors, and others, were made jartles defendant and January 13, 1939, plaintiff filed its amended complaint making a number of judgment creditors, including Dorothy Pherwin, parties defendant, she on October 28, 1937, having secured a judgment for -1425.63 against the mortgagors. July 18, 1935, the mortgagors being in default, assigned the rents to plaintiff, the mortgage, and it operated the property collecting the rente, making repairs, paying taxes, etc. from that time. The Hanleys, the mortgagors, filed their answer to the complaint in which it was alleged that for a long time prior to the bringing of the foreclosure suit the rents had been assigned to plaintiff and on information and belief the manleys averred that the rent collected by plaintiff from the property was more than sufficient to pay the interest and taxes now claimed by plaintiff to be due, and more than the amount with which the mortgagors had been credited. Some months afterward defendant, Dorothy Sherwin, filed her amended answer.

June 12, 1939, Mrs. Therein served notice on counsel that she would ask leave to five an intervening petition on behalf of the Chicago Title & Trust Company, as trustee, that it stand as a cross complaint and for rule on all parties to answer "and for other relief

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THE R. P. LEWIS CO., LANSING MICHIGAN PRINCIPLE AND ADDRESS AND ADDRES

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particular d. 1858, plaintiff filed its complete to forestore .000,8d; le standabel en cours to del biolo le en la le le 100,000, final desired all actions and orders, were all actions all and dominary 15, 1930, challet filed 18: associat revolution and an where of Johnson deedlines, including Jacobic Josepha, continue defondent, she on October 26, 1837, having scoured a julgment for STAILED SQUIRED ble septembers, this is in the property being in default, assigned the ranke to plaintiff, the moregone, and it priver anisom union aniso oil priderites process all defends tame, are, from that time. The Monleys, the worthwicky, filed their sair to the couplaint a with it was alleged that for a long time prior to the bringing of the fereclesure suit tas rects had been seberyers speine and telled has notservated as bue tritabely of benylo and fine the respect of the plainting of the property as not of the illimining we beareds were never has recreated and gray of insisting and les then the capus with which the mortgagers and been halft gairead piters; fundertal figuraria advantam part partiers ier zmended anseer,

dane 12, 1939, Nee, Chervin erred soline on counsel that she would nek leave to five an intervening polition on beneif of the Chicago fittle & Trust Company, se trustee, that it erand as a cross amplaint and for rule on all parties to ensure "and for other relief

prayed for in said petition," and that defendant, borethy therwin, would ask for a rule upon plaintiff to file as account of all rents collected, copies of which were said to be attached to the notice but they are not in the record. June 14 counsel for borothy therwin served notice that she would ask leave to file an amended answer, copy of which was said to be attached to the notice but it is not in the record and June 15 an order was entered giving her such leave. The amended answer was filed in which, among other things, it was alleged on information and belief that plaintiff, the mortgagee, had collected the rents from the property in question for a number of years; that if the rents were properly applied the indebtedness sought to be foreclosed would be paid.

The case was referred to a master in chancery who took the evidence, made up his report and found the mortgagors had assigned the rents to plaintiff, who went into possession, collected the rents and made disbursements in the operation of the premises; that Dorothy Therwin had obtained a judgment in the Municipal court against the mortgagors, as above stated; that she demanded an accounting of the rents and pursuant to defendant's request, plaintiff produced documents showing receipts and disbursements in connection with the operation of the property; that these documents were objected to because they were not the best evidence, the master excluded them and the recommendation was that a rule be entered directing plaintiff to file an account of the receipts and disbursements and that if it failed to do so the bill be dismissed.

*rs. Therwin filed objections to the report in that the master, (1) failed to find that the evidence showed the amount due plaintiff was less than the amount it had collected in rents in operating the premises, (2) that the master erred in failing to state the amount and (3) the master erred in finding from the evidence that there was still a small sum due plaintiff.

Plaintiff also filed objections to the master's report, (1) that the master erred in finding it was impossible to state the amount

project for a rule upon plaintiff to file an economic of all rests reals ask for a rule upon plaintiff to file an economic of all rests collected, sopies of which were said to be attached to the notice but they are not in the record. June 14 counsel for bereiny degree notice that an interest of the said loave to file an emphée and accord, oney of which was said to be attached to the notice but it is not in the record and June 18 am order was entanted giving her such leave. The anemals amount was filed in which, seems other things, it was allested an information and belief that plaintiff, the sertings, it was allested the rectant or makes of secret that if the rests from the property in question for a number of secret that if the rests were property to question for a number of secret that is allest the rests were property applied the indebtedness counts to as forestion sould be paid.

The case was referred to a marter to chancery who took the evidence, make up his report and found the mortgogra had arrighed to rents and rents to plaintiff, who went tate possession, collected the rents and make disturencests in the operation of the provises; that forethy first had obtained a judgment in the Municipal court equalsor the adrigagers, as above attrest; that the described in accounting of the unests checked the property; that these documents were objected to be court they see not the property; that these documents were objected to be court they were not the heat evidence, the marter confided then and the recountedton was that a vale be entered discreting plaintiff to the second of the recount of the receipts and discourcesonts and that it is

The second the color of the color of the second the second due second due second due second due slatelist one less than the amount it had collected in route in operating the president (i) that the marker error in feiling to state the marker error in feiling to state the second seas (i) the small one creek in finding from the evidence that there eas still a small one due plaintiff.

Visitiff slas filed objections to the master's report, (1) the master errod in finding it was impossible to state the amount

due from the Hanleys to plaintiff and (2) that the master erred in recommending that a rule be entered directing it to file an account of receipts and disbursements made in the operation of the premises. The objections were overruled and they were ordered to stand as exceptions. The chanceller overruled Wrs. Sherwin's exceptione, sustained the exceptions of plaintiff and January 22, 1940, entered a decree of foreclosure in which it was found there was \$76,513.92 due from the Hanleys, that all other liens against the premises were subordinate to plaintiff's lien and it was decreed that unless the amount found due was paid within three days the property be sold, the proceeds applied and if there was a deficiency the master report the deficiency. If there were a surplus he should also report such surplus and hold it subject to the further order of the court.

Mrs. Sherwin objected to the entry of the decree and the next day, January 23, 1940, filed her notice of appeal in which she specifies her grounds for appeal, some of which are that plaintiff should have been required to render an account of the rents collected; that "The Master has found from the plaintiff's evidence, " that it had collected more than \$55,000 for rents from the property and she says the entire indebtedness "has been wiped out by the collection of the rents which plaintiff has received from the premises; " that the decree be reversed "with directions that the trial court find the accounting as follows:". Then follow a number of items which purport to show the amount due plaintiff, \$68,699.38 and as against the foregoing credit, should be given as follows:". Then follow five items aggregating \$69,661.17, which purport to show the rente collected by plaintiff from the premises and asks that "a new decree be entered "en " and "give full credit for the above and foregoing rents" and that there be no allowance made for plaintiff's selicitors' fees.

As we understand the record, plaintiff's position is that it has given credit for the net amount of rents received from the premises leaving the amount due as found by the decree. The Sanleys,

due from the Hanleye to picintiff and (E) that the matter error to recount of recommending that a rais be entered directing it to file as mecount of receipts and disburgements made in the operation of the preminer. The objections were overfuled and they very ordered to etcod as exceptions of picints overfuled for the first an exceptions of picintiff and January 12, 1260, entered a locate of foresciptions of picintiff and January 12, 1260, entered a locate of foresciptions in high it was found there was 176,213,97 due from the picintiff a lieu and it was decreased that unless were substituted to short the action of the second form and if there was a deficiency the actor of the sold, the process applied and if there was a deficiency the actor report and enteriors. If there were a surplus to should also papers and anythes and to the forther order of the court.

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Now, Manually objected to the unity of the below and the and day, January #5, 1940, Filed ber motios of arreal in which the Titulals tail one introduced, some of while me the classical chould have been required to reader an account of the read read; and if full i successful believed the contract of the section of the till self-self-d many than the court from the property and she may not the entire indebtedness when seen seek out the collection of the words this plaintiff has construct that the processes that the takens be reversed "with directions that the trial court tind the secounting as follows: Then follow a number of items which rusport to chan the .216ero gelegare's ait facilege ac' ban 60,000,804 ,Tritalele oub faucus should be given as followers, then follow five trees assistant 160,661.19, which purport to show the peace collected by plaintiff the produce and early that to new decree by entered and antievent tank the "attor uniquesel bus event sat set fibere firt evin" to be adjusted the character's action encounty of of

As we understand the record, plaintli's position is that it has given credit for the net amount of sents received from the presises leaving the amount due as found by the decree. The Hanloys,

the mortgagore, made no objection to the decree and do not appeal. Are. Therwin, having alleged in her answer that plaintiff had collected rents sufficient to wipe out the indebtedness due under the mortgage, the burden was on her to preve this allegation. (Foudingt v. minter. 190 III. 394.) The made no such proof but sought to throw the burden on plaintiff and to charge plaintiff with the amount of rents collected without any deduction that plaintiff might be entitled to on account of the operation of the building, making repairs, etc.

Therwin's exceptions to the master's report and entering the decree.

If there is a surplus after the sale of the property, the chancellor can award such surplus to Brs. Therwin or to any other person entitled thereto.

The decree of the Superior court of Sook county is affirmed.

Matchett, J., and Wessurely, J., concur.

the merigary, make as objection to the decree and as not agreal, "repherein, hering alleged in her anders that plaintly had collected
reats sufficient to wipe out the indebtedness due under the mortgaps,
the harden were an her to prove this allegation. (<u>Scudinot</u> v. <u>ilniar</u>.
150 Ill. 1864,) the make no ruck proof but cought to there the burden
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The decree to meet the sect or to any other person satiried.

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SIGHUND STRAUSS,

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AUMI SCRUEN, CHARE & SACH

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ration. Appellant.

307 I.A-236

MR. PRECIDING JUNTION OF CORNOR DELIVERED THE OPINION OF THE COURT.

Flaintiff, the lessor, brought an action of forcible deteiner against defendant, his tenant, to recover possession of property covered by the lease. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor and defendant appeals.

Plaintiff has moved to dismiss the appeal on the ground that the notice of appeal was not filed within five days after the rendition of the judgment nor within five days after defendant's motion to vacate the judgment was denied, as required by \$18, ch. 57, Ill. Rev. Stats. 1939.

The record discloses that the notice of appeal was served 105 days after the entry of the judgment for possession and 65 days after the denial of defendant's motion to vacate the judgment.

A forcible detainer action is a special statutory proceeding summary in its nature and in derogation of the common law. sentworth v. Sankstone, 233 Ill. App. 48; City of Chicago v. The Chicago teamship Lines, Inc., 328 Ill. 309.

The appeal not having been taken within the time limited in \$18 of the Forcible Detainer Act, it must be dismissed. sentworth v. Sankstone, 233 Ill. App. 48; Cholston v. Terrell, 298 Ill. App. 192 (10 B.E. 2nd, 868.).

APPEAL DISHISSED.

Matchett, J., and MoSurely, J., concur.

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-ab skinger in the termine on action of forethic deprince equines defendant, his teacht, to recever possersion of property sovered by the Lease. There was a defel before the court at though a laws, a finding and judgment in plaintiff's favor and defendant

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a reveible detainer notion to a appoint statutory proceeding summers in the noture and in deregulius of the somen law. ... maisorth v. iankutens, 243 Ill. Asp. 48; Ofte of Chicago v. Phe Chicago Roomeaty Lines, Inc., 589 Ill. 509.

The appeal not having been token within the time limited in ils of the Foreigh Retainer het, it must be dismissed. Suntworth V. Tonkerone, 225 Ill. App. 46; Chaleton v. Terrell, 150 Ill. Asp. 182 (10 H.E. Snd, 008.).

Appropriate March

DARROW L. P. WILLIAM DES L. L. BORRERS

41205

JUNEAU L. LAWER,

ampellee,

APPEAL FROM

SUP FAIOR CONT.

GOOR /COUNTY.

L. B. HUNCH, Min. a Corporation

artellant.

30714.236

MR. PATTIDING JUNTION O'CONNOR DELIVERED THE OFINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by him on account of the negligence of one of defendant's agents in driving an automobile. There was a jury trial, a verdict and judgment in plaintiff's favor for \$1350, and defendant appeals.

of April 3, 1937, plaintiff, who was then about 37 years old and had been employed for some time as chief claim examiner for the Lumbermens Mutual Casualty Company, went to defendant's place of business located at Cheridan road and Lawrence avenue, Chicago, to see about buying an automobile. William W. Becker, who was then about 38 years old, one of defendant's employees, took plaintiff in an automobile to demonstrate the working of the make of car which plaintiff was contemplating purchasing.

sest at the right hand of Seeker who was driving the automobile at about 30 miles an hour, south in Broadway, and when they had gone a block to the next cross strest, Becker applied his brakes, the ear stopped suddenly and plaintiff was thrown against the windshield, injuring his head and shoulder.

On the other side, defendant's theory is that as the automobile approached the first cross street, it was going about I wiles
an hour and came to a gentle stop; that 'plaintiff was sitting off
balance and fell against the windshield, and that there was a very
slight injury, if any."

To the transport of the cotion equipment defended to proper to for personal injuries claimed to have been sustained by him on the time of the content and the

The record discloses thet about to o'clock on the afternoon of the record of the record of the second of years old and bad bad bed en employed for secontine as ohist claim exectors for the instrument latural descript Company, went to defendent's place of unsiness located at theridan roof and Lewrence ovenue, Chicago, to see about buying an entoxobile, Tillian T. Sector, who was then about 36 years old, one of defendent's envloyers, took plaintiff in an autocobile to associtate the verking of the sake of ear which plaintiff was contraplating yarobasing.

(Alm 177's theory of the case is that he wee sitting on the annual country of the case is that the authorisis at about 30 miles an hour, south in Broudway, and when they had gone a block to the next cross street, Seeker applied his braker, the ear stopped suddenly and plaintiff was thrown against the windowield, in-

On the other aids, for the sproudled the first erose street, it was roing shout 3 miles to how the first erose street, it was roing shout 3 miles to how the first or had the first or how the first or how the first or had the fi

The two men who were in the automobile testified, plaintiff's testimony tending to support his theory of the case while the testimony of the driver of the ear, leaker, supported defendant's theory of the case. There was also a dispute is the evidence as to whether the brakes of the automobile were in good condition.

Defendant contends the verdict is against the manifest weight of the evidence, should be set aside and the judgment reversed. We have considered the testimony of the two vitnesses on this question and are of opinion we would not be warranted in disturbing the vertict in plaintiff's favor, approved as it was by the trial judge, on the ground that the verdict is against the manifest weight of the evidence.

Defendant further contends the judgment is excessive; that plaintiff suffered little or no injuries and was only laid up about three days.

The accident happened between two and three o'clock on the afternoon of April 3, which was Daturday. Plaintiff's evidence is to the effect that after he was thrown against the windshield he became nauseated - that he was dazed; that Backer, the driver, a few minutes after the car stopped asked him how he felt; that he replied he was disay and stunned; that they then drove around a block or two and then plaintiff took the wheel and drove a short distance to the gas station, the place from which they had started; that he sat down on the front bumper five or ten sinutes, then got in his own car which he had parked nearby and started to his home in byanston. He drove over to the Loycla elevated station, about two miles from plaintiff's place of business, stayed there awhile but feeling ill he left his car, got into a Tellow Cab and was driven to his home in Fvanston [about two miles]; that "I lay down awhile feeling the same way." That Dr. seiss came to see him later on Saturday afternoon and prescribed heat to the shoulder, ice bag to the head, and a sedative, nembutol. The doctor case Junday, Monday and Tuesday, taped his right shoulder and told kim to stay at hose and lie down; that he returned to work on Buraday morning following the accident. "Several times after that I came down The two men who were in the entraphile testified, picker tiff's restinant teading to suggest his theory of the case while the treest of the case. There was also a dispute in the evidence as to sheller the brokes of the estimabile were in good or skiller.

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late and left the office early. I lost altogether the total of ten days, including part days; "that for a few weeks he had an extremely sore back, blinding headaches and his right shoulder was sore; that afterward he sent to see the doctor a number of times. The doctor gave him some heat treatments for the shoulder; that he doc a had accident in October, 1934. "The principal injury was a crushing injury to my left side near the back bone, about six or eight ribs were crushed. There was injury to my right shoulder and to my head; "that he was making \$300 a month; that he saw Dr. weise several weeks after the accident.

Dr. Weiss testified he car plaintiff April 3, examined hiu; that the subjective symptoms "were mauses, he complained of distincts, haziness, severe headache, pain in the right choulder and right obset." That the objective findings were moderate shock, fast pulse, "profuse perspiring, large homotoms on the right forehead, tendersess over the right shoulder, and the upper right chest. That his disguosts was "cerebral concussion and sprain of the right shoulder and the muscles of the neck and right side;" that he prescribed heat for the shoulder, an ice pack for the head and a cedative; that he afterward saw plaintiff a number of times at plaintiff's home and at the dector's office when he "gave him massage and distheray to the right shoulder;" that he examined the plaintiff two weeks before the trial which began monday, "eptember 11, 1930 [two and one-half years after the accident], and "detected evidence of crepitation in the shoulder joint, a crackling consution imparted to the ear through the stethoscope" and gave as his opinion that the injury received might or could cause plaintiff's condition; that in his opinion plaintiff's present condition was permanent "because there is apparently damage to the structures of the shoulder joint" and that plaintiff paid him | 100 in August, 1938.

Upon a consideration of all the evidence in the record we are of opinion we would not be warranted in disturbing the verdict on

late and left the estion carity. I lest alterriae to retail of the same ages, including part force the few souls he had an estimatly layer, included the state state of the same ages; also distributed best to see the distribute a marker of times. The dester of the seet to see the distribute a make of the law also a layer that he had the law also also as state ages that the same she she same that state ages the back home, about also as state rese creations. There was had to by least that

hr. seine terbified im sew plaintiff word it, esmained himp that the emblocative symptoms "arre sausse, so see below 8 of districters, The property was a second track of all all the state of t That the objective findings sere moderate shock, fact wise, 'profess partially, have breeden on the state farmant, herbrines over the PART CONTROL ENG Now appear Pages Control that the Statements was referent and this entitles in health and he strong has nativened trademar. of the meet and will added the for the inertical inst for the standing on her pack for the head and a sedative; The the mist may say plaintollte a restord out to incomed a little mining to some to recover a like that "traditions and in or an all all the stream and avait of near na sa della faler sell buried adois to Titlatal and benimen ad Monday, September 11, 1854 [two and enc-inlf years after the secident]. and developed evidence of everthering in the checker joint, a the "symmetricle and drawning age out of Budgassed parpassed partitioners trus bluce to their bevieses withit out that seinige aid as with plaintiff's condition; that is als opinion plaintiff's present comad to seement firmer of eleration themselve demand and the ni CCI: wid bing Tilinini; July has "Jalog unbloods and to normanda August, 1923.

Upon a consideration of all the cylinean in the record we consider to be retreated in disturbing the verdict on

the ground that the damages assessed were expessive.

The defendant contends "There was serious error in the court's rulings as to medical swidence." The doctor was asked to explain "cerebral concussion." There were some objections back and forth and the witness's answer stricken out.

Further complaint is made to the testimony of the doctor, that he found there was a creaking of plaintiff's shoulder and the doctor gave his opinion that the injury might or could cause plaintiff's condition. The errors, if any, were clearly not reversibly erronsous.

Instruction at plaintiff's request. The instruction told the jury that if they found in plaintiff's favor that he had sustained injuries as alleged in his complaint and, as a direct cause thereof, 'he see unable for a period of time to work or engage in his usual accupation, then the fact that his employer continued to pay him his wages or salary during such period is not to be considered by you in assessing the plaintiff's damages, if any, because the gratuitous payment in such circumstances" would not preclude recovery. It is said the instruction was erroneous because "it assumes that there were gratuitous payments, and though the man was off work only three days the jury from the language of the instruction might assume that they could assess damages for a long period of time while the plaintiff was unable to perform his full duties, though he may have been on the job and receiving full pay."

We think the giving of the instruction does not warrant a reversal. O'Brien v. Chicago City Ry. Co., 305 Ill. 244; Leobler v. Voelpel, 346 Ill. App. 69. In the O'Brien case the court said: "No injustice is done to a person negligently injuring another in requiring him to pay the full amount of damages for which he is legally liable without deduction for compensation which the injured person may receive from another source which has no connection with the negligence, whether that source is a claim for compensation against his employer,

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Further completed to made to the testioner of the dector, that he found there was a creating of plaintiff's shoulder and the doctor gave his episton that the injury sizes or scale asser alsiabilt's condition. The errors, if may, were clearly are reversibly errorsons.

instruction as plaintiff's favor that inchestion told to jury that
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We think the giving of the instruction does not verteet a Vertral, fet III. App. Of. In the <u>Ulirian</u> ours the sourt said: "No injustice is done to a govern negligabily injuring another in requiring him to pay the full amount of dissect for which he legally limble ulthout locketten for compensation which the injured verses may receive from another source which has no connection with the negliganor, whether that another accounted on a stack the negliganor.

a policy of insurance equinet accidents, a life insurance policy, a benefit from a fraternal organization or a gift from a friend."

Moreover, we think the amount plaintiff received for the three or ten days he did not work is trivial and ought not to work a reversal.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

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The judgment of the compactor court of Scok county is

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Matchett, J., and Hofurely, J., concur.

41181

MAPLE CODE ACRIMENT CO., IM., a OF CHICAGO.

Corporation,

Appellant.

Appellant.

3 07 I.A. 237

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment of \$1700.40 entered upon a verdict directed by the court.

Plaintiff's statement of claim alleged the sale by it to defendant of a number of "worm gear reducers complete with motors:" that these were shipped to defendant; that the total amount of the shipments for which defendant has failed to pay the plaintiff amounts to 1755.40. Defendant filed an amended affidavit of defense, and counterclaim for damages; the court on motion struck the counterclaim of defendant and the case went to trial. The judge ruled that defendant must first proceed with its evidence. No evidence was effered by plaintiff, and at the close of the evidence offered by defendant a peremptory instruction was given to the jury to find for plaintiff for the amount claimed and judgment was entered against defendant.

alleged that defendent purchased from plaintiff a sample motor and gear reducer for a specific purpose which was made known to the plaintiff; that the motor and reducer were required "to pull 30 gage material;" that the sample purchased performed this work but that thereafter, with the exception of two of the twenty-four motors and gear reducers purchased by defendant, to equal the sample, they did not operate or perform the work as the sample had done; that plaintiff was notified of the failure of these units to work properly and, at the request of plaintiff, fourteen of these were returned by defendant to plaintiff; that certain of the machines in which these units had been installed were sold by defendant at a greatly reduced price by reason of these defects; that representatives of plaintiff saw the units in

Sefendent appeals from an alverse judgment of 1915, 45 entered upon a verdist directed by fix court.

Plaistif's elekant of claim alleged the neis by it by defendant of a maker of farm year reducers consists with solons; that these were shipped to defendant; that the total amount of the child these were shipped to defendant; that the pay the plaistiff asonate to ilfac. 40. Lefaudent filed an amouled officiers of defence, and counterclaim for demages; the court on motion struck the constantials of defendant and the case went to triel. The judge ruled that hereaft ast must first proceed with its evidence. In evidence was offered by defendant o plaintiff, and at the close of the evidence offered by defendant o peremptory isotruction one given to the judy to find for plaintiff for

car reducer for a specific jurpose which was made known to the jielnthf; that the motor and reducer were required "to jull 10 jurp waterial;" that the motor and reducer were required "to jull 10 jurp waterial;" that the emple purchased jerformed this nork but that there
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plaintiff; that certain of the machines in units these anits had been
installed were sold by defendant at a greatly reduced price by recon
installed were sold by defendant at a greatly reduced price by recon

operation and admitted they were not according to the sample. The counterclais contained an itemized statement of damages claimed by defendant on account of the failure of the units purchased to operate properly.

Plaintiff argues that the court properly struck this counterclaim as it did not fully and specifically allege ultimate facts and the items of damage. Inspection of the counterclaim does not support this charge as the items claimed are fully and specifically itemized.

Flaintiff says the theory of the counterclaim was inconsistest with the theory of the statement of defense. There is no
merit in this. The counterclaim adopts the allegations contained in
the statement of defense and there is no inconsistency between the
denial of the amount claimed to be due and the claim of damages socruing to defendant because of the imperfect units subsequently delivery
ed to defendant. It was error to strike the counterclaim.

Defendant complains of the action of the trial court in requiring it to proceed first ith its evidence. Ilmintiff introduced no evidence. A defendant is properly required to introduce its evidence first when a prima facie case for the plaintiff has been established. Santa Rosa-Vallejo Tanning Co. v. Aronauer, 228 III. App. 236. Here the plaintiff's statement of claim alleged the purchase and delivery by it to defendant of units at the prices specified in the statement, with an affidavit that the total amount due for these shipments was 1755.40. The affidavit of defense merely denies that there is due plaintiff this amount but does not deny the purchase, shipments or prices. Section 40 of the Practice act (chap. 110) requires that "every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates. " Under these pleadings plaintiff established a prime facie case and the burden then was upon defendant to establish an affirmative defense.

Plaintiff says defendant did not return any of these units said to be imperfect. The evidence, however, above that these were

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siffering complains of the netion of the trial court in requiring it to present first till its syldens. Fisiavit invadance no evidence. A Automiant is proporly regulard to introduce the evidense first them a prime foots one for the plaintiff has been and JE 100 comment or of animal stafferment about being their liberate The received the claim till's states to describe of 111 in process of the delivery by it to infromme of units at the releas aracified is the statement, with we markidert the test teamers are for items chigments was 11755, 46. Ins affidavit of defense revely Lanine that printed or the for and for forms and richards on it week no of whom finis . The classes were and the resum a grave facility of policein oil to soleng lin shat to fainth to not eighe fieliges a heistifuse Titusatio entitles these theisties of mide gries frois care and the burden then was myon defendant to evaluate an affirmative defense.

Plaintiff sage defendant did not return any of Cose units

delivered to the manufacturer of them as requested by plaintiff.

There were a number of questions of fact which should have been submitted to the jury for determination. Defendant consedur that some of the units worked according to the sample but there were questions of fact concerning other units as to whether they worked according to sample and whether this sames expense and damage to defendant, and whether they were returned by defendant. Defendant had a right to accept the units which worked and to reject those which did not work, with ensuing damages.

Many technical points are raised concerning the pleadings and competency of evidence upon which it is unnecessary to comment. The controlling controverted points relate to the facts, which should be submitted to a jury.

The judgment is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P.J., and Matchett, J., concur.

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inlivered to the manufacturer of them on requested by plaintiff.

Times more a number of cuestions of first which should have been enjouitied to the jury for determination. Defendent conscious that some of the units worked according to the compile but there were questions of fact concerning offer units as to chaiter they worked according to temple and whether these consendant, and shopier they were syturned by defendent. - effectivity which did not work, with enough decayer.

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The centrolling controverted points relate to the facts, which should be submitted to a jury.

The judgment is the reform reversed and the omire remarked for a new trial.

ACTUAL CALLS TO SELVEN

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PRANK J. HART,

Appellant,

JOSEPH S. DUNCAN,

Appellee.

APPEAL I LH MOI AIGH COURT.

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MR. JESTIC MODURELA SILLIVERED THE OPINIS OF I.A. 2372

Plaintiff was employed by defendant as accretary for some ten years; the employment terminated in September, 1939; plaintiff then brought this suit seeking to recover 41,156.46 as additional compensation for services rendered by him alleged to be outside the ecope of his duties under his contract of employment. .laintiff's second amended complaint upon sotion of defendant was dismissed; plaintiff asked leave to file an amendment to his second amended complaint, which motion was denied. He appeals from these orders.

The motion to dismiss asserted that the services rendered by plaintiff were within the scope of his employment; that there was no express or implied promise by defendant to pay plaintiff any extra compensation and that the claim is barred by the statute of limitations.

In 1927, defendant advertised in the Chicago Tribune for a "Secretary;" information was requested as to experience, references and calary expected; the advertisement further stated - "Young man who have some knowledge of bookkeeping and stenography and, preferably, had some experience in the buying and selling of bonds and stocks." Plaintiff replied to this, writing a letter, stating that he had been employed for fourteen years as secretary to a Mr. Hend who dealt largely in securities, trading constantly, taking profits and making changes in his list. Plaintiff further stated in his letter that he had deviced a record system which had received favorable comments from banks, brokers and bond men; that he executed all trades that Mr. Hend and, looking after his interests and dividend payments, his correspondence and banking, and performed "other secretarial auties too numerous to

The motion to dissile the sequence that the services remissed by plaintiff were within the sequence of his englapment; that there error express or implied greater by defendant to pay claimit? Any extra compensation and that the claim is barred by the statute of list-

In 1987, defendant advertions in the Chicago Tribube for a "Tecrotary;" information was requested as to asymptons, references and salary experience, the advertionment Enginery Stated - Towns can this bad some knowledge of socializing and stenography and, preferably, but some experience in the buying and solling of bonds and atomic." Taketist replied to this, writing a letter, easily that he had been emilosed for fourteen pears as secretary to a ir, read who dealt largely in record system which had received in his letter that he had deviced record system which had received favorable semicate from beats, but it is a second of that we had deviced had received favorable semicate from beats, but it is executed all traces that we had seen and the favorable semicate from beats, but it is a second of the favorable semicated for beats and that we had peace to the second of the favorable semicated to beats.

mention here. ' To this defendant replied caying that the 'experience you have had seems to be very much in line with the work I have in mind for you."

An interview fellowed in which plaintiff again detailed his work as assistant to Wr. Mend. Defendant stated that if he employed plaintiff he would expect plaintiff to study reports of financial services, call defendant's attention to any recommendation that appeared therein concerning securities and to assist defendant in making his selection of securities. Defendant then proposed to par plaintiff 175 a week for his services, to which plaintiff replied that he house he might be entitled to more in the future if his work was satisfactory.

Plaintiff's complaint itemizes four services performed by him for defendant which plaintiff claims were extra or additional services to those covered by the terms of his employment. The first item is the preparation of income tax returns for defendant and his wife. Practically all of the information necessary for the preparation of these income tax returns would be found in the accounts which plaintiff was required to keep. The tax returns would be taken from these accounts and would require the usual secretarial work.

Plaintiff claims he was entitled to additional compensation for his services in connection with the Andes Copper Mining securities; that while defendant was away a broker urged plaintiff to cable defendant to sell at a certain figure all the debentures of this company; that plaintiff had special and confidential information as to the value of these debentures and did not advise defendant to make such sale; that thereafter they were converted into stock which was sold at a prefit of over \$15,000 for defendant. Plaintiff claims \$5000 as additional compensation for such services.

Another Hem of service for which plaintiff claims additional compensation is the giving by plaintiff to defendant of information concerning the value of securities in the Tax Security Corporation whereby defendant recovered a substantial amount in settlement. Plain-

mention here. 'To this defendant replied raping that the 'agreck and you have had seems to be vary much in line with the work I have in wind for you."

An interview followed in which plaintiff again interview work as anticions to Mr. bend. Infendent stands that if he engloyed plaintiff he would expect plaintiff to study remotes of linearial estvices, call defeatant!s attention to any recommunication with appropriate the religion of securities and to sector defeatant in scring his selection of securities. Defeatant then proposed to an plaintiff to be here he here he have a securitied to the here he have he had the securities to so that a fature if his very was a tienter he night be entitled to more in the future if his very was a tientential.

Plaintiff's complaint itemises four carriors party by

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Caintiff cisies he was entitled to additional compensation for his services in connection with the actor Copper states status while defendant was away a broker urged plaintiff to eakle dated and the debantures of this tendant to sell et a certain figure all the debantures of this comment; that plaintiff had special and centifential information as to the value of these debantures and did not advise defendant to make such sale; that thereafter they were converted into excet water use sold at a profit of over 118,000 for defendant. Fisintiff claims

compensation is the giving by plaintiff to defendant of information concerning the value of securities in the far Security Corporation of a schedulish amount in settlement. Flain-

tiff claims an additional compensation of USCOO for this previous.

Plaintiff next alleges he learned that bankruptcy proceedings were pending against the "ciellan Stores Company, a Delaware
corporation; that after making diligent search plaintiff concluded
that the market value of the stock was far below its intrinsic value.
Plaintiff thereupon persuaded defendant to purchase some of the stock
of this company and from this purchase realized a large profit. Flaintiff claims 126,136,46 as additional compensation.

we are of the opinion that all of these services were within the scope of plaintiff's suployment. He was required to keep accounts of all bonds, stocks and securities owned or acquired by defendant or his wife; also to perform all clarical work in connection with the purchase and sale of all bonds and stocks. It was part of plaintiff's duties to call defendant's attention to information as sering in the financial reports relating to securities. In the letter which plaintiff wrote in answer to defendant's advertisement, plaintiff related in detail the character of his services to Mr. And, his former enployer. These describe the activities of Mr. hand with reference to securities, and plaintiff set forth his familiarity with these activities; that in addition to keeping the account of Ar. Hand's securities he executed all trades in these securities. It is convincingly shown in the letter by plaintiff to defendant and in the conversation between the parties as to the duties and terms of employment, that all of the matters for which additional compensation is sought were fully covered and included in plaintiff's duties.

Plaintiff eites cases where it has been held that where extra services are performed entirely without the sphere of the service for which the contract was made, the law will imply an agreement for extra compensation. In Mathison v. N. Y. C. & H. A. Co., 76 N.Y.B. 89, an employee's duties required him to inspect engines and run them in cases of emergencies; he was requested to and did run a switch engine four or five times each day for about sixteen months; he

tiff claims an additional companistion of 18000 for this rervios.

Out of the market value of the event was few below its intrincis value, fint the market value of the event faintiff thereupen persuaded defendant to ture here even of the elect of this purchase realized a larger profit. Finintiff elains (36,156, 36 as additional componention.

midily over confrom anoth to the took notation out to are of the scape of plaintiff's employment. He was required to been escapents to Suchariah to berispes to bears well traces has a cooks absolution to his wife; also to perform all elevical sork in consection with the ourchure and anic of all hands and stooms. It was said of mine and mir at waiten the metro court of neitheath a traduction line et entud financial reports relating to occurities. In the letter which platstill wrote in answer to defendant's advortirement, pleintill related in detail the character of his corpiese to Mr. weed, his former asployer. These describe the activities of .v. bend with reference to enedi diin vilasifima ald digot toe Tilfalafa bas seldinoos s'hasi ... To taccos out antested to million at that theistvisor eccupities he excepted all trades in these securities. It is corvicately shown in the letter by pluintiff to defendant and in the -mu to amend has taltub and at an animar and mosated noticepayaving ploy ent, that all of the meters for which additional componention is cought were fully oppored and included in plaintiff a duties.

Flaintiff eites onese where it has been held that where extra rervices are performed entirely without the sphere of the sarvice for which the contract was made, the law will imply an agreem to W.E.S. 20, an employee's dution required him to inspect engines and wan them in cases of energonoles; he was requested to and did run a

un them in ouese or sacryenoiss; he was requested to the claims and the

brought suit for extra compensation for the additional services of running the switch engine and obtained judgment in the trial court: this was reversed upon appeal and the court well stated the principle controlling. Ifter notine that the law would imply an agreeant for extra compensation, the opinion says, "This rule is based upon the probability that for such service there was an intention on the part of the master to pay extra compensation, upon which the servant might rely. But this rule must be cautiously applied, and the service must be so far outside of the sphere of the suployment as to indicate a probable intention on the part of the master to allow extra compensation therefor. If the question be one of doubt, the right to extra compensation should rest only upon an express agreement. Any other rule of law would introduce dangerous uncertainty and instability into all contracts of service." This was followed in Murray v. John Griffiths & Jon. 95 N. Y.J. 573, where it was said that proof of a new agreement to pay extra compensation was essential; that "To held otherwise would be to require employers to have specifically snumerated and definitely catalogued, at the time of the hiring, every simple service the proposed employe might be called upon to perform, lest ingenuity could subsequently differentiate between services, so as to create additional liabilities." To the same effect are Voorhees v. excutors of woodhull, 53 M.J.L. 494, and Robinstte v. Mubbard Coal Wining Co., 98 W. Va. 514, 519.

It is undoubtedly true, as stated by plaintiff's counsel, that the motion to dismiss admits the truth of all allegations in the complaint which are well pleaded, but this admits only the facts stated in the complaint to be true and does not admit that the plaintiff is entitled to recover. The city Barge a Gravel Co. 280 Ill. App. 596, 610.

Plaintiff claims extra compensation for services randered over a period of ten years, during which time he received his regular salary and made no claim of any kind that he was entitled to any further compensation. In Levi v. Reid, 91 Ill. App. 430, plaintiff sought

to analy me I maistifu and well moiseneemee write to a fire advector running the relieb ongine and obtained jadgment in the trial occur: al louis and hatele lies trues out has lacque acque becaves see sidd rol throwing on plant blues well add test noting that the small terror eafra componention, the opinion cape, "This rais to inted approving probability that for each service there was an infantion on the care iddin thereon out dolds does notionamen with you of rotona out to roly. But this rule runt be contiguely of their and the service work be no far outoide of the aginer of the employment as to indicate a -suggest and to wall's of transmost in the police and interested addedong enthem thursdor. If the exector he eas of doubt, the street we extra compensation chould read only upon an express egranual. Aus etias willingest him grait Jeson successed comported bluce was to always mich ." account of breakful and a lift ." opposite to avacuation life stad Colifern and January Constitution of the Constitution of the Constitution The horaceness ylinelylos in evel of president control of the control of definitely detailed, at the time of the hiring, every simple service the proposed orgins alght be called upon to carbors, lest tagements could subsequently differentiate between services, so so to exect additional liabilities. To the care effect are Ventions v. receives of Landing as M. J. L. to an arrest of the land to 88 W. Va. 519.

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It is undoubtedly true, as stated by plaintiff's seemes!, that the sorion to dismise admits the truth of all ellegations in the complaint which are well pleaded, but this admits only the rests outled to recever. It is entitled to recever. Thelen V. Iwin City Same a gravel In. 200 111. App. 888, 618.

Plaistiff claims entry conjensation for carviess rendered over ten years, during which time he received his regular to and made no claim of any kind that he was entitled to eng furtum compensation. In text v. held, 21 111, App. 435, glaintiff cought

extra compensation above his salary for alleged extra work in the evenings and on Mundays; on appeal the judgment in his favor was reversed, the court saying plaintiff did not hisself regard his employer as under any contract liability, as "shown by his conduct in keeping a secret account and making no mention of it to his employer until his employment was ended." In hoss v. hardin, 79 %.Y. 84, it was held that where services are rendered by one in the employ of the person for whom they were rendered "the law implies that the services were rendered under the contract of employment, unless the contrary be shown, and this implication is much stronger if the services are of the same character as those embraced in the contract." Other cases to the same effect are Cooper v. Brooklyn Trust Co., 96 %.Y. .. 56 and Heideman v. Bolger, 65 Ill. App. 658.

In Sowash v. Amerson, 32 Cal. App. 13, cited by plaintiff, the facts are quite different from those in the case at bar. There there was no relation of employer and employee between the parties; plaintiff agreed to furnish the deceased with room and board; afterward becoming helpless, plaintiff did the work of a nurse for the deceased. It was held that the nursing services were entirely outside the original contract.

Plaintiff argues that he should have been allowed to file his amendment to his second amended complaint. The amendment suggested was that plaintiff "informed" defendant he expected compensation for his alleged extra services. It should be noted that neither in the original complaint nor in the first amended complaint, was there any allegation that plaintiff had "intimated" or "informed" defendant of any expectation of additional compensation. The proposed amendment was clearly in conflict with the allegations set out in the previous complaints. The court did not abuse his discretion in denying this motion. Subin v. Chicago Title & Trust Co., 249 Ill. App. 466, 469.

We are also of the opinion the statute of limitations was a good defense. Plaintiff was employed for an indefinite period at a weekly salary and plaintiff had a claim against defendant for this at

ording and on 'undays; on aspect the judgent in the force was severally and on 'undays; on aspect the judgent in the force was severand, the source saying plaintiff all out himself rejert as large on contract liability, as "shown by his confict in healing a searet account and mixing as centical of it to the configure until the complete see saded. It is force to the configure until the complete see saded. It is for the configure of the convicts when whom they seem to the large that that the convicts were them and this implication is much stronger if the convicts ways choose obstacted in the contract. I there exers the same contract as the contract of the same obstacts as those ordered in the contract. I there exers to the same offers are incored as those ordered in the contract. I there exers to

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the end of each week. The statute of limitations begins to run from the viza a course of action account. Actt v. Changes, 44 11. 40. 12, and Innia v. Fullman Palace Car Co., 165 III. 161.

All of the alleged extra services by plaintiff, except passibly and item, were renkered once than five years prior to intoker 30, 1030, the date of the filine of the original complaint, and hence are barred by the five-year statute of limitations.

se have not noted all of the many cases cited by industrious sounsel for plaintiff. A have given the affirmative reasons for our conclusion that the orders of the Irial sourt sere proper and the motion to dismiss should be sustained.

Hithirty.

O'Connor, F.J., and Matchett, J., concur.

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PETER BAIN.

 307 I.A. 238

MR. JUNTICE MCHURELY DELIVERED THE OFFEIGH OF THE COURT.

Appellant,

Flaintiff brought suit to recover damages for injuries received while attempting to board a street car operated by defendants; for the verdict was defendants and plaintiff appeals.

The secident occurred at the intersections of Division and Halsted streets in Chicago; plaintiff had alighted from a north bound Halsted street car which stopped some distance south of Division street; he walked north on the east side of Halsted and when he reached Division he saw a west bound Division street car approaching 100 to 120 feet east of Halsted; when he reached the south ourb of Division the car was 40 feet away; as he came to the east bound street car track the west bound car passed him and came to stop at its regular stopping place at the northeast corner of the two streets, with its rear end opposite plaintiff.

In the complaint it was charged that defendants negligently operated the street car "in that they failed to give the plaintiff an opportunity to safely board the said electric street car."

Flaintiff testified that he went around the rear end of the street car and, while it was standing still, put his left hand on the grab handle at the rear of the platform, his right foot on the step, and as he started to lift his left root from the ground the car started, causing him to fell; he testified that when he was in this

Theintiff brought to recover dumner for injuries received while extempting to beard a expect car a crack? by formdants;

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the verdict weakness and plaintiff areas.

The mediant courses at the intersections of vivices and Maleted atreets in Chicago; plaintiff had alighted from a north hound Haleted etreet can which stopped some distance south of Fivision street; he sulhed north on the east olds of Haleted and that he reached fivision is reached Fivision he saw a west bound Vivision atreet cas equeraching 100 to 150 feet cast of Maleted; shan he reached the scath outh of Division the cast of feet away; as he came to the cast bound street out treet bound our rassed his and came to stop at the value of the west bound our rassed his and came to stop at the with its year and opposite plaintiff.

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Plaistiff tostified that he west sround the rear end of the street car and, while it was standing still, but his left hand on the greb handle at the rear of the platfors, his right feet on the step, and as he started to lift his left foot from the ground the car

position on the car the conductor was looking at his, although he did not hear or see the conductor ring the bell.

A witness, Andrew Lineks, testified for plaintiff that he could not see ever the street car and did not know what happened on the other side of the street car; that when he heard the screech of the wheels the car had stop ed and plaintiff was lying in front of the stop sign on the northeast corner.

Clara worked testified for defendants that she was on the platform near the entrance door; that when the ear started there was nobody on the step or going on the step; that after the ear started and had gone some distance someone ran around from the back part of the car and held onto the car but was not standing on the step; that he rolled off in the street; that the signal was immediately given to the motorman and the car stopped.

The motorman did not see plaintiff attempting to board the car. The conductor testified he was standing on the rear platform; that when the car reached Halsted it came to a stop on the east side of Halsted where a lady and a man got on; he gave the signal to proceed; after the car had gone about a car length he saw plaintiff grab hold of the rear grab rail on the rear of the car and try to swing himself over to the step, but he let go and fell over on his hands and knees; he came over from around the back of the car; he was not there at the time the street car started; at the time plaintiff attempted to take hold of the car it was going about 10 miles an hour.

rear of the car, facing north. He testified that when the car reached the east side of Halsted it stopped and two passengers get on - a lady and a man; then the car started; that when the rear end of the street car was about at the east crossing of Halsted, he heard the smergency bell and saw a hand or hands trying to grab hold of the center bar of the platform.

The greater weight of the evidence tends to disprove any negligence on the part of defendants. On the contrary, it shows

position on the our the sendanter was leeding at bis, although in 63A net base or see the conductor when the ball.

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Clara bestal testified for coloniants the service on the platform near the entrance deep; took when the est started these cannology on the step tract after the our started and had gone some distance someone ren exempt from the best of the the the test of the car and held onto the car but was not standing on the step; there he relied off in the street; that the signal was insedictedly given to the substrain and the car stopped.

The motormen did not one plaintist estempting to beend the our. The conductor vestified he are standing on the seas platform; that seen the car manched helated it ours to a ptop on the cost cide of flateted where a lady and a sen yet ont he pays the cignal to property after the oar lady and a sen yet on length he can plaintist grab hold of the rear grab rail on the rear of the car and try to saley himself over to the etem, but he let go and fell over an his hade and have at the came over from around the bank of the car; he was not there at the time of the sale not three at the time of the sale hade and the held of the car it was going about 10 miles an hour.

rear of the car, facing merth. He testified that when the leng reat as the rear of the car, facing merth. He testified that when the car reached the oast class when the car reached the cast that the passengers got on - a lady and a man; then the car eterted; thut when the rear end of the street car was about at the cast crossing of Faleted, he test the seargency bell and can a hand or hands trying to grab hold of the center har of the platform.

The greater reight of the evidence tends to disprove any

elearly that plaintiff undertook to board the street car after it was in motion.

The appealing plaintiff does not arous that the verdict is contrary to the weight of the evidence but his brief is confined exclusively to criticisms of instructions given on behalf of defendants. It was said to be erroneous and prejudicial to receive 30 instructions given at the request of defendants as against 0 given at the request of plaintiff. . do not approve the giving of a large number of instructions, sepecially in a case like the present one where the issues were simple. Mowever, it has been held in a number of cases that although a needless number of instructions are given, that fact alone will not be ground for reversal if the instructions are correct. Carson, Firie, Scott & Co. v. Chicago Ays. Co., 300 Ill. 346, 388; Baubach v. Drake hotel Co., 243 Ill. App. 298, 308 and Chicago City Ny. Co. v. Manducky, 198 Ill. 400, where the ruling of the trial court restricting the number of instructions was held to be error, the court saying any rule which would authorize the refusal of an instruction otherwise proper to be given, on the ground alone that as anny instructions as the rule allowed had been given, could not be defended.

with much skill the brief for plaintiff criticizes most of the instructions given at the request of defendants and defendants' brief attempts to answer. To attempt to analyze and determine all the points made in this respect would be merely an exercise in logomachy.

Most of the points made have been made in similar personal injury cases and we do not find that any of them, standing alone, constitute reversible error, except, possibly, instruction to. 15, which in effect told the jury there was a city ordinance making it unlawful for any person to board or alight from a street car while it was in motion, and that if the jury believe plaintiff was doing this he can not recover. The mere fact that plaintiff was violating an ordinance at the time he was injured will not bar his right to recover unless the unlawful act preximately contributed to the accident. Mussell v.

clearly that plaintiff undertook to hear, the ethnet car often it ear in motion.

the sympaling plaintiff does not be time that the verifier is -ac leaf the weight of the evidence but his brief to the very to contrary clustyely to eritleters of instructions riven on behalf of defenderic annipartical II prisers of Islaids are the appending of the sec of property and the review of trade and as assume that he desugar and he nevin and the continue of the contract of the contract of the contract of the structions, aspecially in a case like the greens one views the terms were siegle. However, it has been bedy in a maker of excesting elthough a modern number of inctroctions are given, that force alone will not be ground for reversed it the instructions are correct. banbroh v. Trete Hotel Co., P. W. III. A., 198, 198 and . bio. o . 184 My. 20. v. and 178, 193 113. 400, where the sulty of the trial cours Facts old cover of of Ried are positive dad in veloci off salfalylars multourisat ar to locator all extractor along dotte alor you yatyon oflurates proper to be given, on the ground alone files as tong yastructions as the rails alkered has been drup, engls and be determined

Vivi end et instructions plan at the propert of definite criticies more of the instructions plan at the propert of definitions and definition of the above to analyse and detection of the propert would be service an exercise to inspendicy.

Most of the points made have been used in circles persons injury cares and we so not find that may out then, etanding alone, ounting cares and we so not find that my outset the just there was a city or inches it unlawful for any person to beard or alight from a secret car wille it ran in not recover. The west fact that plaintiff has violating an ordinance at the time he was injured will not har his right no recover unless the unlawful act annihilation of the content. The unlawful contents and the first so recover unless the unlawful act annihilation to the content.

Richardson, 300 Ill. App. 350, 556 and Lerette v. Director General, 306 Ill. 345, and many other cases. On the other hand, it has been held that violation of an ordinance designed to promote safety is negligence per sa. Flynn v. Chicago City Lv. Co., 250 Ill. 460, 460. Here the evidence showed that plaintiff attempted to board the car after it was in motion, which caused the accident. This being true, there was no negligence on the part of defendants and hause plaintiff sould not recover, regardless of the existence of any ordinance. Under these circumstances, giving of the instruction will not measure a reversal.

The verdict is supported by the greater weight of the evidence and was not produced by any irregularities or errors in the instructions given, but solely upon the facts as developed by the witnesses.

The judgment is affirmed.

JUDGMENT AFFIRMLD.

O'Connor, P.J., and Matchett, J., concur.

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Ups 111. 288, and many other series. In the other hand, is bee bronded that that the violation of an ordinarca designed to premote selety in love the evidence chosed that plantally estee as to bear the out the case the rease as there was no negligance on the part of defendants and sense aletter than the case are defendants and sense aletter than the case are defendants and sense aletter than the covered.

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The verdict is supported by the product of the last section of the instructions given, but colejy ayon via feets as seveloped by the witnesses.

The judgment testfireed,

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O'CONNESS T.I., and Materials for Enclose,

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MAKE T. HOWE, ot al.,

Municipal Corporation.

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VIII.ASS. OF FORMS PRODUCT.

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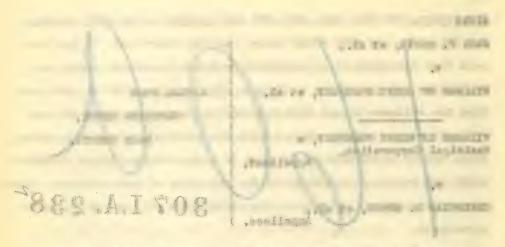
307 I.A. 2382

MR. JUSTICE MCGURELY DELIVERED THE OPINION OF THE COURT.

The Village of Fount Prospect appeals from an order striking its cross-complaint which it had filed in a suit brought by Mary ". Howie for an accounting of moneys alleged to have been collected on certain special assessments.

Her complaint asked that an accounting be made as to the special assessments and the issuance of special assessment bonds. It alleged that beginning with 1927 and annually thereafter the Village of Mount Prospect collected a large sum of money in special assess white which it was its duty to segregate and use in payment of certain bonds at maturity. An answer was filed denying in general the allegations of the complaint.

Thereafter, the Village of Fount Prospect filed its crosscomplaint making Christian b. Susse, village treasurer, and eight other persons alleged to be sureties on his bond, parties to its crosscomplaint. It was charged that Busee, as village treasurer during the years that the special assessments were in collection, had misapplied these collections and that the sureties on his bond were liable and therefore had an interest in the final determination of the processin. The parties named as cross-defendants moved to dismiss this crosscomplaint or in the alternative to make the allegations more definite and certain. The motion to dismiss was allowed. He request to assend



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Her complaint asked that an accounties to a least an account to the special account and the special account account to a special account account account alleged that the september of the section of the section account account account account account account account at was its daty to respect to and was in process of account account at account account at account account at account account account at account account account at account.

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other persons alleged to be saveties on his band, parties to its orcecomplaint. It was charged that bases, as village transmer during the
reare that the special assessments were in collection, had misspaling
these collections and that the exceties or his band were liable and
therefore had an interest in the Final Setermination of the proceeding.
The parties mand as cross-defendants acred to dissinctinity or as in the allegations were definite
collection to it the alternative to make the allegations were definite

was made and the cross-complainant appeals to this court.

complainant to show in this court that the order appeals from the errors of the brief of cross-complainant takes no such showing.

Tress-complainant is this court admits that the complaint "is not accomplate or as perfect as it could be," and asks this court to give leave to asked the cross-complaint. No suggestion is presented as to the character of the amendment proposed.

ants who are interested in any controversy may be made parties defendant so as to determine any liability, yet we do not think this authorizes the practice of bringing in sureties over a period of years, commencing in this case with 1927, thus cumbering the record.

Moreover, the motion to strike the cross-complaint asserted, among other things, that the cross-complaint was multifarious as joining distinct and separate causes of action; that it did not comply with section 38 of the Practice act, which requires every counterclaim to be pleaded with the asse particularity as a complaint and complete in itself. Dection 33 requires that each counterclaim must be separately pleaded, and section 36 requires that whenever the counterclaim is founded upon a written instrument, a copy thereof must be attached to the pleadings unless the pleader shall make an affidavit stating facts that such instrument is not accessible to him. The cross-complaint does not contain a plain and concise statement of the pleader's complaint but merely makes the general allegation that an accounting will determine the liability of each of the sureties. In many other respects the cross-complaint was insufficient and the motion to strike was proper and it is affirmed.

AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

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The opposing councer comparing one the burden is an one opencomplainant to show in this court that the order opposind from an excursions. The brist of crear-complainant makes no main stands, ease-complainant in this court simils that the courtains his not as complete or as perfect as it could to," and same this court to give late the creat the crear-complaint, he oughesting is gravened as to the character of the countainty propersi.

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41224

ELIZABETH SUBBERG, Successor Trustee to Charles A. Roepke, deceased, FRED A. NAMENALL, and GEORGE W. STEWART,

Appellees,

CONTRACTOR COUNT.

COOK COUNTY,

CLANDIC D. MATTERS, LOUIS W. MACH, LOUIS H. MACH and CATHERING MACK.

Appellante.

307 I.A. 239

MA. JUNGICK MODURLY DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a foreclosure decree and orders of court denying motions to vacate the decree; the record purports to show that the decree was entered by stipulation of the parties. Defendants attack the decree in this court, arguing that a consent decres is not strictly a judicial decree; that a decree by consent without any evidence is always error; that no proof was taken and the stipulation upon which the decree was entered must appear fully in the decree itself.

Plaintiffs filed a complaint to foreclose a mortgage made by Clarence D. Natteson to secure his five promissory notes of 4000 each; answers of the various defendants were filed; there was anparently discussion between the parties and June 22, 1939, they appeared before Judge Fisher of the Circuit court, where in an extended colloguy between the court and counsel representing all of the parties, the court dictated in substance the following: The t it was stipulated between the parties that the court should enter a decree of sale in both cases [the other case is Mullins, et al v. Sedman, et al., No. 41225, upinion filed this day | some time in october, but if before the sale the parties should settle their differences the court would modify the decree in any form that the parties might stipulate; that if, before October 1, defendant Mack should deposit in Fulling v. Sedman, 4000 and in the present case a deed to the property involved, and should plaintiffs refuse to accept this, a motion to vacate the decree would be allowed as a matter of course, the parties then

infenients appeal from a forestonure learne interiors of court despits, and the court despits motions to vacate the decree; the seast the increase was entered by attrulation of the increase was entered by attrulation of the intion to a not strictly a judicial decree; that a decree by account itimal any evidence is always arror; that no proof was taken and the ottow lation which the decree was entered must appear inlig in the decree was entered must appear inlig in the decree

Pisistiffs filed a complete to forcelose a mortgage and Clarence b. Matteron to secure his five evaluacry notes of the the contests at the vertices televised were Viled, there were a ready of more filtered and he readed made oranted love colloguy be treen the court and council researches at the parties. -write was the their traineflat and enasteding at haterpik trues and lated before the purties that the easy's should enter a decree of re the both energ frim other care to allies, or it we inferre, is it is it is a state of the day acres that to intoler, the is in it is it. druos sit ascaration and alter invite solver all also sale motes sould soldly the decree in any form that the parties slift stipulate; the at, before totaber I, defendent their chould deposit in fulling v. land, 14000 and in the present case a deed to the property lavelyed, the erace of moirce a made that the contract allitately to the contract editar edt, source of contract the parties where

standing before the court in the same continuous they then stoom, with the right to have a full and complete hearing but should Mr. Hack fail to make the deposit of 14000 and the dead, the sation to vacate the decree will be overruled and the decree will fellow in the ordinary and usual way.

Mr. Limmerman, acting for plaintiffs, stated that this was agreeable to his clients. Mr. Mack, who was acting for the defendants and himself, was asked whether the parties present had all of the authority necessary "to enter into the stipulation to be binding on all parties in interest," to which Mr. Mack replied, "Absolutely." The parties also agreed as to the length of time for the proposed settlement and, to the question whether betober I should be the limit, Mr. Mack replied in the affirmative. Mr. Sternberg, whom the record describes as attorney for defendants, also acquiesced in this agreement. The court suggested that written copies of the agreement be given to each of the parties and the attorneys expressed the opinion that it would not be necessary to have the respective eignatures of the parties to the agreement.

Pursuant to this stipulation a decree was filed June 24, which recites it was entered "pursuant to a certain stipulation" between the parties, all of whom appeared in open court by their respective attorneys, defendant wask appearing pro se. The decree also recites that the court was "acting pursuant to the stipulation entered into between all parties, after due notice to all parties entitled thereto, including all of the parties to the action and their attorneys heretofore specified herein." Defendants made motions to vacate the decree, which the stipulation indicates were to be made so that the court would retain jurisdiction.

The necessary funds and the deed which the stipulation provided should be deposited by Sotober 1, 1959, were not deposited and additional time for this purpose was granted. December 15, 1959, the court entered an order overruling the motions of defendants to vacate the decree. This order refers to the stipulation entered into

stading before the court in the sens josition as t of then stock, with the right to have a full and complete hearing but smould in hear full to make the deposit of 14000 and the deeps the motion to veneto the deeps will be everywhed and the deeps will follow In the

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The court surgested that critten copies of the agreement be given to one of the agreement be given to one the parties and the atterneys empressed the opicies of the agreement.

which recites it was entered "parsulat to a certain chieviation" between the parties, all of whom appraised in ones court by their respective attenties, detendant had apporting the section also that the court was "noting parties to the stipulation entered into between all parties, after due notice to all parties untitled thereto, including all of the parties to the action and entitled thereto, including all of the parties to the action and entities to vacute the Secree, which the retipulation indicates were to be made on that the court would retain jurisdiction.

The necessary funds and the deed which the stipulation provided should be deposited by Dotober 1, 1933, were not deposited to the sections of defendants to the sections of defendants to vector the decree the decree and the section ontered into

in open court on June 32, 1939, by all parties to this cause by their respective duly authorized counsel, including defendant seek. The order referred to and recited the main provisions of the stipulation.

January 12, 1940, defendants made another motion to vacate
the decree, Mr. Nack then stating for the first time that if he had
understood the clear legal effect of the stipulation he would not have
been a party to it. The court ruled that the parties were held by
the terms of the stipulation and denied the motion.

In Bergman v. Thodes, 354 Ill. 137, 143, it was cought to set aside a decree which the record showed was entered by agreement of the parties. The court held that a decree so entered by consent can not be reviewed by appeal or writ of error, citing Faine v. Boughty, 251 Ill. 296, and Galway v. Galway, 231 Ill. 217. It can only be set aside by an original bill in the nature of a bill of review. Moderadel v. Steele, 237 Ill. 289, and Mungarian Benevelent Society v. A16 Society, 283 Ill. 99.

It is not necessary that the decree recite the stipulation.

If the stipulation appears in the record no recitals in the decree are necessary. Grow v. Harrison, 248 Ill. 462, 466. In Schuler v. Hogan, 168 Ill. 369, 383, it was held where a decree recites that it is by consent it will be presumed that it is upon sufficient evidence. Moreover no special findings are now required. (§64 Fractice act, ch. 110, Ill. Rev. Stats. 1939.)

v. horthern Trust Co., 238 III. 601, merely holds that a decree must show it is a consent decree but it does not hold that the stipulation must be incorporated in the decree. Krieger v. Krieger, 221 III. 479, holds that a decree not showing any consent can be shown by other evidence to be pursuant to a stipulation.

Defendants say a consent decree is nothing but a contract and therefore governed by the law of contracts, but the case they cite in support says, "A consent decree partakes of the nature of

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In Servery v. Moder, Not 111, 137, 147, 18 yes source to ant action of servery to act action of servery which the record where of the parties. The court held that a degree on sidered by operat aca not be reviewed by spread or well of every cities ising v. Immirity 331 III. 230, and delway v. Inland, 231 III. 230, and delway v. Inlanded by action bill to the server of a bill of review. Internally v. Itematical actions in the colour v. Internally v. Itematical actions is a colour v. Itematical actions in the colour v. Itematical actions is a colour v. Itematical actions in the colour v. Itematical actions is a colour v. Itematical v. Itematical actions is a colour v. Itematical actions in the colour v. Itematical actions is a colour v. Itematical actions of the colour v. Itemat

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If the obligable appears in the record no recitels in the decree and the consessor in appear to special finitings are now required. (in trunction and,

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the transport says, "A consent decree parteixes of the nature of

both a contract and a decree. * American far reducte Co. v. oridner Smith & Co., 238 Ill. App. 151, 158.

Other suggestions under by defendants are sithout merit. The decree and the orders of the trial court are affirmed.

AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

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Other suppositions and or desinament are although errit.

Access and the orders of the trial sourt are affirmed.

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41225

R. I. DAVIS, succeeded by LOGAN
L. MULLING, Acceiver, CHAVATA
KOMPKK, Trustee, succeeded by
LEROY A. DARR, as Increasor
Trustee, et al.,

Appellees,

M. Lateran

GENERAL GOURT

BOOK GOUNTS

CHARLES MEDWAM and abult a. MACE. Appellants.

3071.A. 240

MR. JUSTICE POSTURELY DELIVERED THE OFFICE OF THE COURT.

various orders entered in a foreclosure proceeding; the complaint to foreclose was filed January 8, 1927, by H. I. Davis alleging that Charles Vedman, one of the defendants, was indebted in the principal sum of 190,000 and executed four notes for 19000 each secured by a trust deed conveying real setate as security; that plaintiff was the legal holder of one of the premissory notes on which there was then due 1000 with interest. Answers were filed by defendants.

Subsequently Logan L. Mullins, as receiver of Mumboldt Dond and Mortgage Company, was substituted for M. I. Davis; also, an affidavit was filed stating that Charles A. Acephs, the trustee in the trust deed had died October 6, 1931, and Leroy A. Gerr as successor trustee was substituted in his stead. The decree sought to be reversed was entered December 15, 1930, nearly thirteen years after the complaint was filed.

In the smantime various phases of the litigation have been before the courts. Davis v. Jednan, 256 Ill. App. (abst.) 637, certiorari denied by the Supreme court; Chicago Fitle & Trust Co. v. Mack, 262 Ill. App. (abst.) 632, affirmed by the Supreme court in 347 Ill. 480.

The cause was referred to a master in chancery who teck evidence and filed his report. From this point the case is in most respects a companion case to <u>Bundbers</u>, et al. v. <u>Matteson</u>, at al., No. 11224, in which an opinion has been filed by us this day. That we have said in that case is applicable to the instant case.

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Terestons entered in a rorected or accessing; the consists to verious erders and verious erders discussed in a rorected or accessing to reversions the reversions that deniety d, 1827, by 2, 1, 1921 and allegian the original deniety of the celevisions, var insched in the original sum of 470,000 and executed tous names for 8110 and accurating a trust cost conveying yell cation as security; that electric and the terminal costs accurated as a conveying the terminal costs and conveying yell cation as security; that electric and the terminal costs are conveying and a conveying and conveying are conveying and conveying are conveying and conveying and conveying are conveying and conveying and conveying and conveying are conveying and conveying and conveying are conveying and conveyin

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In the meantine various planes of the little tion have interested the courte, forta v. (sint.) for, cortionart denied by the forests occurs; this entire the forest occurs; coil, 255 Ill. App. (abst.) 605, affirmed by the suppers court in the risk occurs.)

 June 15, 1939, the case came on for argument on the master's report, which was favorable to plaintiffs, and objections. The court indicated that he would overrule all the objections and exceptions.

June 22, 1939, the following popurous, as in the sundbare case referred to. The court stated that it is stipulated between the parties berain as follows: "That the court enter decrees of sale in both cases" (referring to Mulling, et al. v. eszan, et al. and Sundberg, at al. v. Natteron, at al.), setting the date of sale constine after the respending of court in the leptember term. It was then suggested to make the date October 1, which was agreed to, the saurt also stated that a motion to vacate should be entered in sand case and that if before the date of sale the parties should settle their airferences the court would assify the decree as the artics might stipulate. It was also sarmed that should the plaintiffs refuse to accept a deposit of 4000 by Mr. Mack before wetober 1, and a deed to the property involved in the jundberg case in full sattlement of the indebtedness involved in the two cases, the motions to vacate would be allowed. Should Mr. Mack fail to make this deposit and deed, the motion to vacate the decrees will be overruled. In answer to an inquiry by plaintiffs' attorney as to whether there was present all the authority necessary to enter into the stipulation so as to be binding on all parties in both cases, Wr. Mack replied "Absolutely." This was also acquiesced in by Mr. Sternberg, described as attorney for defendants.

The decree, which was entered June 23, 1939, recites that it was entered pursuant to the stipulation between the parties in the instant case, naming them, "all of whom have appeared in open court by their respective attorneys," and Louis W. Mack, who appeared <u>no se</u>; that after hearing arguments on the objections to the master's report the court overruled the same and approved the report. The rest of the decree is in the usual form.

Mr. Mack failed to make the deposits with the court as provided for in the stipulation, and December 18, 1939, the court en-

or by 1822, the following openions, as in the conflowing ours referred to. The court stated that it is maintained between the nt also le record catha freen all saul's trallat an atomat satisment how is to in what . T. In to antiliar at paternam of the and mirror size to that mir mirror the to meeter w Ja to expelse note that it word remove a mil at wood to primerous or a cole enginethel to make the date tober 1, which and agree to the court but were done at brooms to bissis status of notice a tady butage only - Tis utad office binema tolding out vial to said and maked it tend Total The sour sould madify the deares of the tarrante of residentaling and blummin fact begans on to mem fit .confucior some a firm of the property of the bare Cotable to the and the and to Annable as I had an one problem air at bowlovel gracery and indebtedance involved in the two oanes, toe motions to venite is made he edd , head new through olds coins of that down , or flandi , be offer motion to weake the decree will be everywhell. In annua to an inand the decemp, are event redicing as an percental tribulate of union authority seconary to enter into the attigulation so as to be binding an all paythes to bell stant, but your star plant at anything the re was also consiseed in by "to "terminer, described on attorney for .admahmelab

The decree, which was entered June 32, 1837, recites had it entered pursuant to the stipulation between the parties in the in-

fr. Sack failed to make the deposite with the nount an

tered an order overruling defendants' motions to vacate the decree and in the order recited that "the foregoing recital of events from and including June 22, 1972, to and including the date of this order is true and correct and is hereby adopted as the findings of this court." The order further recites that the denial of the motion to vacate "was pursuant to the aforesaid stipulation." It is established beyond dispute that the decree of foreclosure entered June 23, 1930, was entered with the consent of all the defendants.

Defendants question the right of Miss R. I. Davis to somence the foreclosure, but she testified that she held the note, No. 3, for the benefit of Sumboldt State Sank. The execution of the note and mortgage and the default were admitted by defendant lednan. The trust deed authorized the institution of the foreclosure suit by the legal helder of the note, and Charles A. Keepke trustee, joined as coplaintiff. Kazunas v. Wright, 286 Ill. App. 554, 559.

The brief of defendants contains a lengthy statement of certain transactions involving the Louisville Fuel Co., the Leystone Trust a Tavings Bank and other parties. None of these transactions is germane to the sole decisive question presented, namely, has the decree entered pursuant to a binding stipulation of the parties? The record clearly shows that this was so. In <u>lundberg, et al.</u> v.

**Stateson, et al., No. 41224, in an opinion filed this day, we have held that this stipulation was binding and the decree entered was valid.

where a decree recites that it is entered pursuant to a stipulation it will be presumed that such consent was given. <u>Bchuler v. Bogan</u>, 168 Ill. 369, 583. It has been held that a decree entered by consent cannot be reviewed by appeal or writ of error. <u>Bergman v. Mhodes</u>, 334 Ill. 137, 143. It is not necessary that the decree recite the stipulation if it appears in the record. <u>Crow v. Marrison</u>, 948 Ill. 462, 466.

we have repeatedly said, quoting from Stoll v. Sottlieb, 205 U.S. 165, 172, "It is just as important that there should be a place tered an order revised that "the foregoing realts of trace in the december in the content revised and that "the foregoing realts of events from all including fewer of, 1905, to at recivelar the off this of this court, is the order tarther real test the dealth of the order tarther real test the dealth of the motion of the order tarther to the aforewalk stipulation. It is a stabilized beyond directly the the consent of forest and the description of the astabilized beyond along the the consent of the determinant.

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v. <u>Horna</u>, 185 Ill. 360, 560. It has been held that a decree entered by concent cannot be reviewed by appeal or wit of error. <u>Harrist</u> v. <u>Hondes</u>, 530 Ill. 137, 163. It is not secretary that the decree recibe the atipulation if it appears in the record. <u>Grou</u> v. <u>Harrisch</u>, 243 Ill. 463, 463.

na have repeatedly said, noting from cooll v. Cotilleb, 208

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to end as that there should be a place to begin litigation."

for the reasons above stated and also stated in Lundberg, et al. v. Fatteson, et al., No. 41774, the decree and orders appealed from are affirmed.

AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

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41177

ALTER E. HILLER & CHERRY, a Corporation,

Appeller,

JOHANNA MARTEN,

Appellant.

ATTEAL PROPERTY

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240

MR. JUSTICE MATCHETT DELIVERED THE OFFICE OF THE COURT.

This suit was begun August 13, 1937, by a confession of judgment which plaintiff caused to be set aside on its own motion on October 6. Thereafter plaintiff filed an amended statement of claim and defendant an affidavit of merits with demand for jury, tendering the fee, and the cause was placed on the jury calendar.

September 19, 1939, the case came on for trial in the absence of defendant and her attorney. Judgment for 1391.30 was entered on the finding of the court. September 22, defendant seved to vacate the judgment. The motion was supported by an affidavit of attorney for defendant, showing that he was misled as to the time the case was to be tried and also facts which it is claimed showed a defense upon the merits. When the motion came up for hearing on Movember 13, 1939, the parties entered into a verbal stipulation that the hearing should be "solely upon the pleadings and exhibits, for an adjudication upon the validity and sufficiency of plaintiff's claim as set forth in said Amended Statement of Claim and upon the validity and sufficiency of defendant's defense as set forth in her said Defense, said affidavit and exhibits, in the same manner and to every extent and purpose as if no judgment had been obtained ex parte as aforesaid."

The pleadings were submitted to the court with exhibits consisting of Exhibit 1, a contract of conditional sale to which the note at the time of execution had been attached; Exhibit 2, a proposal and guaranty for sale of a stoker which was the consideration of the note; and Exhibit 3, a copy of schedule of receivables showing the assignment of the note and account to plaintiff. Upon considering

307 FA. 240

This suit was begun furnet 12, 1967, by a confracton of judgment which plaintiff caused to be set acide on it can median ou Getober 6. Thereafter plaintiff filed on america state on to claim and defendent an affidavit of merite vith deasna for jury, vandering the fee, and the same man placed on the jury valender.

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September 18, 1888, the once one on for Trial in the abecace of defendant and her stiorney. Julyment for 1881. 30 was carefored on the finding of the cours. September 25, defendant coved to vecate the judyment. The motion was separated by an affidavit of attorney for defendant, showing that he was misled as to the ther the attorney for defendant, showing that he was misled as to the there the cose was to be trick and also facts which it is claimed showed a defence upon the merits. Sone the motion came up for hearing on Sovewher 13, 1988, the parties embered tate a verbal stigulation that the hearing should be "solely upon the pleadings and spidbits, for an adjudication upon the validity and sufficiency of plaintiff's claim and sufficiency of defendant's detence as set forth in said decaded Setement of Claim and upon the validity and extint and purpose as if no judgment had been obtained and to every extent and purpose as if no judgment had been obtained and to every extent and purpose as if no judgment had been obtained as garing as extent and purpose as if no judgment had been obtained as garing as

The pleadings were substruct to the court with exhibits

outstruct of Exhibit 1, a contract of conditional sele to which the

ness at the time of exceeding had here elimeted: "which it, a proend and guaranty for sale of a stoker which was the consideration
of the note; and Exhibit 3, a copy of subscule of receivables showing

the pleadings and these exhibits, the sourt found that the romissory note detached from the conditional sales contract was a negotiable instrument; that the conditions of the conditional sales contract and proposal and guaranty of which the promissory note was a part did not affect the negotiability of the note, which in the hands of a third party was not subject to any defense arising from the contract, nor from the proposal and guaranty; that Exhibit 3 (the echedule of receivables under which plaintiff received and held the promissory note) did not affect the negotiability of the note nor the position of plaintiff as a holder for value without notice; that defendant was without recourse as against plaintiff and the rights for plaintiff for recovery upon the note absolute. The court, therefore, found as a matter of law that the defense interposed to the statement of claim was insufficient in law and sustained the judgment for 1391.30 previously entered. From this judgment defendant appeals,

The matter was submitted upon the pleadings and the exhibits. The court found, as a matter of law, that the defense was insufficient and sustained the judgment as entered. The pleadings of
the defendant (and they were verified) all asserted that plaintiff, as
a matter of fact, had notice of the defenses to the note. The pleadings of defendant show that the consideration for the execution of the
note was a stoker, and that it was entirely worthless. Assuming
these things to be true and that plaintiff purchased with knowledge,
plaintiff was not entitled to recover as a matter of law. If plaintiff took the note with notice as defendant alleged, he was not a
holder in due course. Section 52, ch. 98, Ill. Rev. State. 1939.

For the error in holding as a matter of law under the pleadings and exhibits that defendant was liable, the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMAIDED.

O'Conner, P.J., and McSurely, J., concur.

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For the armor in halding as a matter of les under the pleadters and cratition that defendant was lighte, the judgment will be ed and the cause measured for another trial.

. AUGULLOUIT CIVA GLORD-VIIA

r, P.J., and hadersty, J., noncour,

41188

PRANK PARTIE.

Appellee.

Institution charles, 100., a Gorporation and Gradus Ford. A cellants.

APPEAL PHON HUMICIPAL COUNTY OF MILITARY

AR. JUSTICE SATOR BY BELIVERED THE STILLS 307 T.A. 241

Defendant appeals from a judgment in the sum of \$1526.50, entered against him jointly with the Inspiration Placers, Inc., a corporation, on the finding of the court. Plaintiff has filed a cross-appeal arguing that his total claim of \$2118.50 should have been allowed and asking this court to enter judgment for that amount in his favor.

Flaintiff's claim was for services said to have been rendered by him for the corporation from Way 21, 1937, to Warch 15, 1939, and 142 for petty cash said to have been advanced for the corporation at its request.

The defendant corporation had a gold mine located at nowie, Arizona, and plaintiff went there to act as superintendent of it.

Flaintiff had been theretofore employed by ford in his Chicago business, and Ford admits that in a letter written by him to plaintiff on December 11, 1937, in order to induce plaintiff to continue in the service of the corporation, he guaranteed sums then and thereafter to become due to plaintiff for his services. The defense interposed was that Ford in later letters (one of January 28, 1938, which is defendant's Exhibit 7 and another of May 16, 1938, which is defendant's Exhibit 8) revoked and cancelled this guaranty.

The evidence as to the amount due from the corporation to plaintiff is conflicting. There was evidence tending to show that in the month of Deptember, 1938, plaintiff was notified and accepted a out in his calary (which theretofore was 250 per conth) to 150. There was also evidence tending to show his employment ended on January 15,

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corporation, on the finishing of the emur. Finished has filed a ore rappeal argular that his tetal claim of fills, so should have been allowed and asking this court to suter july wat for that amount in wis favor.

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The defendant corporation had a gold sine leaved at mosts, Arizona, and plaintist and there to set as superintented of it.

Plaintist had been thereforce copleyed by Ford in his Unicago hardness, and Ford somits that in a letter written by him to plaintist on "you lil, 1937, in order to induce plaintist as continue in the service of the corporation, he guaranteed cour them and thereford was that Ford to plaintist for his services. The defense interpond was that Ford in later letters (one of Jenuary 20, 1940, which is sefendant's Schibit in later letters (one of Jenuary 20, 1940, which is sefendant's Schibit and exceptled this guaranty.

The evidence as to the amount due from the veryoration to plaintiff is conflicting. There are evidence tending to show that in the of September, 1938, plaintiff was notified and secreted a life dainty (which therefores was 1850 per wonth) to 183. There is a control of the september of the septe

1939, instead of earth 16, 1939, as obsided. The trial judge not the witnesses. We cannot say his finding as to the amount due plaintiff is against the manifest preponderance of the evidence. For that reason we may not enter a judgment here for the larger sus plaintiff asks.

For the same reason we think the judgment sgainet Ford may not be reversed. It is true, as Yord contends, that his guaranty was in its nature a continuing quaranty which could be revened at any time on notice. American and Inglish Tay, of Law, vol. 14, 2nd ed., p. 1160; Mamerow v. Mat'l Lead Co., 206 Ill. 526; Rapp v. Phoenix Ins. Co., 113 Ill. 390; Columbia Graphophone Co. v. Microarth, 201 Ill. App. 397. Ford testified he wrote the letters revoking his margary, put then in stamped envelopes and mailed them to plaintiff at Bowle, Arizona. Plaintiff just as positively testified he never received these letters or either of them. Ford admits Exhibit No. A of the letters offered in evidence is only a copy. Ford does not produce any definite reply by plaintiff to either letter, and is an extended sorrespondence which continued up to the time that plaintiff quit work there is not a letter written by Ford to plaintiff which would indicate the guaranty had been revoked. On the contrary, in many of these letters ford remitted money to plaintiff, and in one of them told plaintiff he he needed money "to jack me up" (meaning ford).

The trial judge said that the subsequent letters were inconsistent with the theory the guaranty had been revoked, and we think so too. In the course of the trial evidence was given by plaintiff's attorney to the effect that the letter marked Exhibit No. 8 had never been in his possession, although he said he might have seen it when plaintiff's deposition was taken. Defendant cites tright v. Buchanan, 287 Ill. 468, to the point that evidence thus given will be closely scrutinized and is entitled to little weight. That is the law which we assume the trial court followed. We find no reversible error in the record, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

1839, instead of three 15, 1936, is sinked. 'No trail judge our the mitnesses, we cannot may his finding as 30 the second due, landiff to equipment the manifest opensations of the avidence, for that the may not onter a judgment here has the length one judgment here the the length one pair.

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The trial jodge said that the subsequent letters were inconclutent with the theory the jacenty had been roraked, and we think
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seen in his personner, although he said he might have seen it when
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JUNEAUNA TREBURDA

41108

PROPLE OF THE CT IN OF ILLINOIS,

Defendent in Error,

7.4-

ROBERT ALLEN,

Plaintiff in Error.

SHOOK TO

MUNICIPAL COURT

OF CHICAGO.

307 I.A. 241

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OFINION OF THE COURT.

This case was consolidated by leave of Court for the purpose of a hearing with three other cases in which write of error had been issued to the Junicipal Jourt of Chicago. All of the cases were heard on the same evidence and in the same proceeding in the Municipal Jourt. The brief and abstract of record in this case is being considered by this court as the brief and abstract of record in each of the other cases. The consolidated mumbers in this court are nos. 41103, 41109, 41109 and 41110. In case no. 41103, entitled recople v. Thomas Murphy, the defendant, Thomas Murphy, having died since the appeal as taken, an order has heretofore been entered by this court, on sotion of attorneys for Thomas Murphy suggesting his death, absting the crit of error.

The form of action is a criminal prosecution by the People of the Utate of Illinois, plaintiff, v. modert Allen, defendant, in the Municipal Scort of Phicago, upon an information filed. The defendant was shared in the information that he "did then and there unlawfully and allfully keep a room on the premises located at "4 to. Halsted St., in the City of Unicago, Mounty of Cook, State of Illinois, for the purpose of recording and registering bets and wagers on the speed of a beast, to-wit; a horse in violation of Paragraph 336, Chapter 38, Buith-Hurds' Illinois seviced Statute 1931. The defendant was arreigned and entered a plea of not pullty, and a trial was had by a jury, which jury was a finding of guilty in manner and form as charged in the information. A judgment was entered by the court on the verdict adjudging the defendant guilty of the criminal offense in the language of the

308 I.A.

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The form to serious or 1 pictro - of maison to mad and really broken or o'll seemed a control of the second of the second defendent, in the manifestal Jourt of Tiloner, upon an interestion AND IN THE WARRANT AND AN PROPERTY AND PROPERTY AND ADDRESS AND AD then and there unlawfully and villetite has the tot the coulto proof provide to this roll of part beautiful on It do national Coul, State of Hillmoin, for the unjoin of attaching and raphent beta and regers on the speed of a branch, bo-old; a torne in violation of Farmuscal TML, Chryber 18, mith-Hurda Illimois s becates has bengirers as a trainer of r. 1321 educat becken guilty, and a tried was had by a jury, which jury words y in senner and fore or charged in the informetion. all prigingly failure and no square one of breches see Adjusted to not be appropriate any appropriate programs and his willing Appropriate

to pay a fine of 400, and costs taxed at 8.30; and the judgment contained a further order that the fine be paid in mass or labor in the mouse of Correction until the fine and costs were mid or cortes out at the rate of 1.50 per may for each day's sork or the defendant discharged according to im. An execution as ordered to issue against the defendant for the fine and costs and he as ordered committed to the House of Correction of the City of Chicago. It was further ordered that an execution issue against the defendant for the amount of the fine and costs and the mittimus and stayed fifteen days and the defendant given sixty days to file a bill of exceptions. The pleadings in the case are the information and the plea of not guilty.

The defendant urges that the information attempting to charge the atetutory offence under "An Act to Frobleit Book-Laking and Pool-selling, Approved May 31, 1887, L. 1887, p. 98", and omitting to allege the phrase "with any book, instrument, or device". charges no offense under the laws of the State of Illinois, and that the judgment and conviction rendered upon such information is void for ant of jurisdiction of the subject matter, and the judgment should be reversed and the defendant discharged. In the case at bur it is contended that the information fails to charge any orime known to the laws of the State of Illinois, and perticularly to charge any grime under An Act to prohibit book-making and poolselling, approved May 31, 1887, L. 1887, p. 95" (Ch. 38, Sec. 338, Ill. nev. Stat. 1939, State Bar Assn. Ed.) upon which this presention is based. The provisions of the statute insofar as it is necessary to quote the language of the not provides "That any person who keeps any room, " " with any book, instrument or device for the surpose of recording or registering bets or wavers, or of selling pools, or any person who records or registers bets or seems, or sells scola upon the result of any trial or contest of skill, sceed or rower of endurance of man or beast " " shall be munishable by imprisonment

objected and in the information, and the affected may restrance to pay a fine of the fine

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of galicerite apicacers, wit suit byen heareteb ait on if de-soot fidbigs to the tal and a solution agreement and agreed and find-existing, torsearch may be littly to shift, no till, and omitting to tilege the phress "elt's of book, instrument, or review". price has all line of the last to be and to the total of the control of the contr hist al maisteralar dues not a betalant noticiones int attaging out foregist off her gratus despise and to mediately to muc not to no to the second the second description of the second of blacks weign the Appele of sliet note profit and tent beingtone at it red known to the law of the backe of Lilinois, and we tisularly to or line unition-first facilities of the of better water upo we say selilag, approved day 41, 1887, 1, 1887, p. 38" (th. 38, 180, 330, 111. Ter, Stat. 1930, State but issue bil.) apon which this prosecution is based. The provintions of the statute inactor as it is masseenly speed our accret yes sail's solivers for and to enemal and afone of enouse et al actività un dimerrant instrument es des des des mesors no select Builter for as tendent to say Sultanglish to Say . efect allas to attanta to abid erofelyer to ebroser of m or he haves attitle to exercise no delive you be disease will done stratified of alternation on Finals ". " Support on one by sentential to

in the County Jail for a Leviod not longer than one (1) year, or by
fine not exceeding (3,000 or both. Provided, however, that the
provisions of this lot shall not an ly to the actual anclosure of
fair or race track associations that are incorpor ted under the
laws of this state, during the actual time of the meetings of said
associations, or within tranty-four hours before any such meetings."

at her attempts to charge an offense under the let, but fails to charge a statutory crise because of the oblision from the information of an essential element contained in statutory definition of the crime, to-wit; "with any book, instrument or device." It is further contended that, the information failing to charge any crime, the court had no jurisdiction of the subject matter, and having no jurisdiction of the subject matter, the judgment of conviction is void, and should be reversed and the defendant discharged. Defendant cites in support of this contention, people v. __ownd, 370 Ill. 140, wherein the court said:

"We rule of law is better settled than that an indictment or information must charge all the elements of the offence. As we said in People v. Theldon, 321 111. 70: 'An indictment or information charging an offense defined by statute should be as descriptive of the offense a is the laminum of the attute and should allege every substantial element of the offense as defined by the statute.' The information here, but to that test, does not charge the defendant with any offense known to the law."

tion in the case at bar was contained in the statute defining the crime, and that the emission of this phrase rendered the information void, because without it there was no crime charged.

On the other hand, from the brief filed by the leople, it is contended that the information is not fatally defective and void because of a failure to set forth the phrase "with any bank, instrument or device." It is further contended that the information sufficiently charges a crime, and that even if the information was defective in form, defendant should have taken advantage of this before the trial.

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 In support of these contentions, the People cite Canada calth v.

**erry, 146 kms. 03, 15 %. 484, in which it is supported that the
identical question nor before this court was presented. In that
case the compleint failed to allege that the apparatus, books or
other devices referred to, were fitted or intended for the purpose
of registering bets, and the court there said;

"It was not necessary to describe the method or manner of registering bets or selling pols, or the particular contests which ere adde the subject of grabling. The defendant as sufficiently infor ed of the charge against him, elthough the indictment did not go into minute detail."

and further, in <u>Commonwealth</u> v. <u>Claney</u>, 154 mass. 188, 37 h. E. 1001, the court held that a complaint which only alleges the registering of bets is sufficient. In <u>roosla</u> v. <u>Temmler</u>, 345 ill. 372, colled to our attention, the supreme Court in construing the statute prohibiting book-making, said that the exception stating that the act shall not apply to the actual enclosures of fair or rece-track associations lawfully incorporated and in operation need not be negatived in an information obarging the offense, as the exception or previse has to do only with circumstances under which the act itself does not apply and has nothing to do with the description of the offense.

Plaintiff argues that, whereas, the New York courts in construing its statute on book-making maintain that the exception must be pleaded in the information or else it is fatally defective and can be attacked by a motion in arrest of judgment, and that, therefore, the New York decisions cited by defendant in this action are not applicable in Illinois under the interpretation of the statute in the case of People v. Semmler, supra.

Upon consideration of the question involved, we have before us as suggested by defendant two offences; first, "that any person who keeps any room, " " with any book, instrument or device for the purpose of recording or registering bets or magers, or of selling pools, " " " and second "or any person who records or registers bets or wagers, or cells pools upon the result of any trial or contest of skill, speed or power of endurance of man or beaut " ". " Brendent

entry, 100 Nors. 175, 15 d. . 484, in which as 1. 200 on a think whe has helperisched. In this was consorted and consistent to allege that the province of the consistent to allege the first thing or the species of the consistence of the constant there will

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ind durther, in <u>So corrected</u> v. Cheery, list need the supplication of the court hald that a conjusted entities of the conjusted only alle on the supplies. In <u>Sanio v. Aughry</u>, it is, vo, wiles 'n out attention, the convene Court is according the in rate producting book-mains, and that the annealties entitly the second coloration at this was very test the acclemates of fair or very stack entities in an large time of the coloration and in specific med not an every lived in an information charging the effect when we the averables or every colorate the antity situations water value are averables or every one to an information of the colorate water value are not itself there are not apply at the circumstances water value are not itself there are not apply

to pleaded in the inform tien or view it is ferrily defective and one to expected by a motion in arrest of judenant, and that, therefore, the live love latter that this ection are not allowed in little to this recent interpretation of the statets in

s of song the dealth possible of the entropy three, dischang person of reference of religions of records or representations of records or resident of each order of and seconds or resident of each of the result of each of the result of each order.

suggests that under the first offense, because the words "with any book, instruent or device" assemitted, no charge of wicetion of this statute is made, and that, therefore, the court erred in entering judgment on the wardict of the jury. However, ben a come to consider the second provision belied to our attention in language as above stated it would seem that the defendant has violated the statute if he recorded or registered bats or angers, or sold pools upon the result of any wrigh or contrat of skill, agend or rever of andurance of man or beast. Then we consider further that the evidence that are presented to the court and jury are ocitted from the record and has not been preserved by de en ant, as have the right to assume that there are evidence offered that justified the verliet of muilty and the punish and as provided for in the judgment entaged by the court. a feel that under the circumstances as we have them before us, the offense and charged within the language of the statute and the defend at was notified of the charge sufficiently to be able to present his defense, and for the jury, to understand the offense and for the court to pass judgment aren the verdict. (Reople v. Donaldson, 341 111, 389).

In <u>People</u> v. <u>Cohen</u>, 308 III. 573, the Jupreme Court in part said:

only be countenanced and supported when it is contract that defendant may be surprised on the trial, or unable to meet the charge or take preparation for his defense for out of greater certainty or particularity."

entering a Judgment on the verdict of quilty that was returned by the jury. It is further contended by the defendant that the judgment we void in that the court ordered as part of the judgment that the fine and costs be worked out in default of payment; but, it would seem from the Griminal Gode, Sec. 391, ch. 26, Ill. w. "tat. 1939, Just 1937 seem. Id., that any person convicted in a court of record of any misdemennor under the Griminal Gode may be

ditte sites but a more governing forth wit more t di plessen by cosk, instrucent or ferior are emitted, p. cherge of wealtier of this abstate is even the t. The reform, the center as all in Band to need tweeters. The tell to to the tell and the te to consider the second encylaion called to me waterties in Longo of oni tatainis nen de une en mid full mess klips di bet de sonde pe stars also no .es o to the total total or to had no not be interested as the contract of the c to the to have a will be desired to Leave you to discounsely more ely teds wouthal tebleron and .dered to som to constrain and testion on that has been no being sent as with abanking the proof and has not been present by defendant, as beyon the the same the times are the south of the same of the state of on an enoughtenests the carrier test as enterna by the court have then before we, the effector was charted within the language current wit to Initiate now inclusively mit has equals wit to and family to be this to record his reton. , and for he pery. nery late good been at dress and had bee temetre and but (wester, descination, 341 111, 343). often being mar-

es are of the opinion that the court in not are in the realing a judgment of the court of the court that are the returned by the judy. It is the their consented by the defendent that the judgment of a state of the judgment the ring and an interest of the judgment of the ring and the ring of the judgment of the judgment of the judgment of the ring o

required to work out such fine and coats at the rate of \$1.50 per day. (reople v. herman, 145 ill. sp. 34; reople v. levey, 345 ill. App. 100.)

From a consideration of the record in this case, we are of the obtains that there is no error in this record that would justify a reversal and accordingly the judgment is affirmed.

JUDGGERT APPIRED.

BURKE, J. CONCURS.

DERIS E. SULLIVAR, J. SPECIALLY CONCU-RING:

I agree with the conclusion, but not with all that is said.

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41109

PROPER OF THE TRAVEL OF TREEST

Defendent in Error.

ELLIS GREENBIRG.

Plaintiff in Error.

MUNICIPAL OGUAT

OF CHICAGO.

MR. PRESIDING JUSTICE HEBEL DELIVINED THE OFINION OF THE COURT.

Having considered this case under consolidated case No. 41106, the cases having been heard on the same syldence and in the same proceeding in the Municipal Court, and consolidated by leave of court for the surpose of hearing in this court, the opinion that e have filed in case No. 41106 applies and controls in this case.

> Accordingly the judgment of the trial court is affirmed. AFFIRMED.

BURKE, J. CONCURS

DENIS E. SULLIVAN, J. SPECIALLY CONCURRING AS IN 41108:

I agree with the conclusion, but not with all that is a id.

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SOLL AL SELLIVER, J. SERVINE AND AND AND AND ALLOSS.

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PEOPLE OF THE STATE OF HELINOIS

Defendant in Error

JOHN RAMABILA.

OF OHICAGO.

Plaintiff in Error.

307 I.A. 2414

MR. PRESIDING JUSTICE HEBEL SELIVERED THE OFINION OF THE COURT.

Having considered this case under consolidated case

Ho. 41198, the cases having been heard on the same evidence and
in the reas proceeding in the funicipal Court, and consolidated

by leave of court for the surpose of hearing in this court, the

opinion that we have filed in case No. 41108 applies and courtels
in this case.

Accordingly the judgment of the trial court is affirmed.

BURKE, J. CONCURS

DENIS E. SULLIVAN, J. SPECIALLY CONCURRING AS IN 41108:

I agree with the conclusion, but not with all that is said.

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41117

CHARLES PURKA, Appellant.

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OFFICE OF THE COURT.

This is an appeal by the defendant to reverse an order of the Criminal Court of Jook County sustaining the State's seanded motion to dismiss a written motion filed by defendant in the nature of a writ of error Gorna mobis provided for by section 7% of the Practice Act.

The defendant was indicted and convicted of larceny of property of the value of 130.00 in the Griminal Court of Conk County. The facts stated in defendant's assended action in the nature of a writ of error cores nobis appear to be that when the defendant was arraigned on the indictment before the Monorable signed i. McKinley, chief justice of the criminal court, it appearing that he subolly without funds to employ a languar, Benjamin J. schrach. the public defender of Cook County was appointed to represent him; and that, thereefter, one, Worris H. Soohs, represented to the defendant that he was an assistant public defender, and the defendant, believing that he was the attorney appointed and selected by the court to represent his and having full raith and confidence in said Morris M. Inche made a full and true statement of the facts in connection with the charge against him, and relied sholly upon said lorris it. seeks to present all and any of his legal defences to the crime with which he was charged and to carefully propers and proment his defense upon the trial of the cause. It further accesses from the facts stated in the written sotion that the defendant had never been arrested, had had no experience in courte of law, and had no knowledge of legal procedure; that he had no knowledge of the difference and distinction between the crises of petty largeny and

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the defendance Landau to the transfer and and analysis of . There is the day to deliver and as 1000 to waser and to wiscome To action the significant of acts of the natural si buseus acost out installation and has send on as summer aiden auron cours to fire a . I freces of compared traffic annualization and boundary of sedinicy, obled justice of the crisical court, it is resting the he was shelly mithout farms to so key a layer, rend also, andreadpuls descripted defender of County on a vertical to referebal oilsing substitutes but as becaused patient or extrao year profession of the the properties and the granders william standards as now and books and additional and believing that he are the athemy appined and release by the court to represent the said wing fall relate on some description of light it. I come with this and even abetween after the term in commention with the char a sectart him, and relied having ; on well with at mende to the cut of the lord of short at street Jan tro tar areasy glighter o of har be range and ed dolds dily emiro and defense upon the trial of the organs. It thereon spread from royed had durantial and dads notion modifies and as butter at a conted the . . . I to sentence in courts of its , out he ! est to entolement on how he test team on beteen the orders of profy levery ond

grand largeny or of the difference in the punishment provided for the respective crimes; that he had no knowledge as to the value of the telephone cable which he was charged with steeling. It is further alleged that defendant did not at any time authorize said Morris H. Sachs either to represent him as his attorney or to saive a jury or enter a technical plan of not mulity or to attitulate to any evidence on his behalf; that Morris M. Eachs is not the public defender of Jook County, that he am not an ascistant public defender of Cook County, and that he had at no time been appointed as aspistant public defender. It further appears that as soon as the defendant was brought late the courtroes of Judge illian J. Lindsay for trial on April C. 1939, the said sorris H. Aschs --the first to address the Court stating technic I also of not quilty. jury waived, stipulate as to swidenes." It further appears that morris it. Inche stipulated that the value of the property alleged to have been taken by the defendant and 30, whereas, in truth, it is alleged that the value of said property, new, was 45,000, and that, but for the negligence and improper and unsuthorized conduct of Morris H. Tachs in stipul ting to the value of the said property. there would have been no evidence before the Court upon which a finding could be based fixing the value of the property taken; and that the errors of fact as charged occurred eithout any negligance on the part of the defendant, and that he was thereby deprived of a substantial defense which he could have made at his trial,

The amended motion in the nature of a writ of error cores nobis was supported by the affidavit of the defendant, Charles furks, about of the rects contained in the motion, and by the affidavit of Marry frits, manager of the telephone department of the Graybar fleetric Company, Inc., sho made oath that the Graybar fleetric Company was enumed in the samufacture and walk of electric goods and equipment, including telephone cable, and that from affiant's experience the retail price of the enty-five fact of the cable described in the indictment was teenty cante per fact, f. c. b. Chicago.

and horagest intoduction and an enquirible and to an amount because tolly rail of ar a believed on bod od smit presing ovidoogsay odd . The take the confidence and double office announced and be lis or itself a call was to the ter anchoring foul hereile goddwar at the peared to all ye aid thousened of radio educa . H sirre otefu ite at to ville, that he cale included a return to your a color es. You as as'n. . I caree I de thind a sad we comedine you ed reblied de learner an one as and a di aphason deed to rebustab align interest a mond on at my day to the and day been a versue would be unknowned es despire derig en e la receptat il ambadian pildur fuedatan pe the defendant was over the bit committees to dail it in it. it is it. Lindony for trial on teril d. 1276, one and comin s. webs went aville, the to the limitators pristed and als apprile of terit of jury reived, at brelevite abyter yant tolt attended middings (I to all yeverers to be not well and bedring the edge of mirror to have been taken by the dereniant of the chares, in bruth, it ins good too the transfer to be to be to de took beyelfe bi lowings besired as a respectable sensitive out to the sensitive Torring to the cold la cold to the term of the cold to a milita narra recoll let? beares manufave as asset wend fifting braid ion thing doubt to be with the will be the brokenty tolers; and in acroiliges was should be the bound of the trans and tends on the part of the defeating and that he are the copy and no Lairs sin to ohom ware ligon on dains constan lairgetadge a

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The State filed an amended motion to dismiss which, after arguments beard, was overruled by the fourt, and the state as thereupon directed to answer the amended motion. The state filed its enswer in which more of the anterial allegations contained in defendant's motion were dealed. Here the state's attorney was an oral motion and answer thereto, the state's attorney was an oral motion for leave to withdraw its answer, and the Court there—upon allowed the state to situature its answer and mustained the State's accorded motion to dismine which had been previously denied.

The Court thereupon entered an order denying the defendant's amended motion filed under section 72 of the Practice Act.

The defendant contends that the sourt erred in sustaining the amended motion of the plaintiff to disside the defendant's amended petition in the nature of a writ of error coras nobis and in denying defendant's said amended motion. The purpose of the motion in the nature of a writ of error coras nobis is defined by our supress.

Jourt in the case of reople v. Crocks, 386 Ill. 760, 380, wherein the court stated in part as follows:

"Trops of fact which may be availed of on a writ of error coran nobis or under section 80 of our practice act include duress, fruit and excusable mistake." "The writ of error coran nobis, or a motion under our statute, is an appropriate remedy in criminal as well as civil cases. Such a writ lies to set aside a conviction obtained by duress or fraud, or share by come excusable mistake or ignorance of the accused, and without assignment on his part, he has been deprived of a defense which he could have used the aist trial and which if known to the court would have prevented a conviction, "" The sufficiency of the action which is regarded as a declaration in a writ of error coran nobis, or a motion under the statute, must be reised by desurrer, ples of faults act errors, by action to dismiss, by cleading special matter in confession and avoidance, or by making an issue of fact by traversing the declaration."

The defendant states that the outstanding fact in the case is that because a lawyer, without any investigation or preparation of the case for trial, stipulated that the value of %5 feet of telephone cable and 30 when, in truth and in fact, the value was %5.30, the defendant was arongfully convicted of largeny and sentenced to the penitentiary for an indeterminate term of from one to ten years; and that the true value of the property was a full and complete defense to the crime of largeny as charged.

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The decimal states had the consecuting feet in the annual interpretains of the decimal of last investigation or preparation of the case to the trial, stipulated and the trial case of he feet of the feet of the trial of the case of he feet on the case of the

4 Coursel for the defendant urge that the assistant Public Defender. th tagge red for the defendent at the trial as defendant's attorney, did not properly present the defense that should have been urged on scholf of de end at, and that by reason of his action the defendant as deprived of the defence that the value of the property that was involved in the charge of largeny was not 30.00. but was as a fact worth only (5.00), and that, therefore, by his foliure to urge the question, the defendant was found guilty of larceny of property of the value of 30.00 and punished by being incorporated in the penitentlary for such set. The fact is, however, that the office of audio defender is provided for by Itatute in Chapter 34, sees. 163-s to 163-j, inclusive, Illinois sevised Statutes, 1839, and the act provided for the appointment of assistants to such modic ofenier. hen this assistant appeared before the Court it does not appear that at any time Juring the course of the trial an objection was and by defendant to his serving as counsel. It is the rule that in order to take advantage of facts complained of, objection must be made to the court so that the court could pass upon the items cosplained of. e must remember that in order that advantage be taken of any acts that appeared at the trial, the act complained of must be made known to the court.

The Court in the case of Jeanle v. Crooks, 330 Ill. 200. held that froud on the part of the opposing party or his counsel that prevents one from making his defense is such an error of fact as can be availed of on writ of error coran nobiz or under the statute sforesaid. The writ of error coram nable, or a motion under said statute, is an appropriate remedy in criminal cases as sell as in civil cases. The court further held that such a writ lies to act aside a conviction obtained by duress or fraud, or share by some excusable mistake or ignorance of the acoused, and without negligance on his part, he has been deprived of a defense which he could have used at his trial and which if known to the sourt would have prevented a conviction. The facts, however, as stated in the petition filed by the defendant, were known to the Court.

* ក្នុងស៊ីន និក្សាស្មានក្រុម កម្មភា ។ និង ការុធន និការាស៊ីន និង ក្រុម និការប្រាស់ Lafendar, that are not for the William at the print of the print of the print of actioney, did not provide the selection of the id house gailer ain to possest to that had not to the fact of the board as board wood and the enjoy this park and that built is invitable for impossional and or of the two times and the course of the and the times of but was as a fact sorie will said, and that, the refere, we him in while topes or burishly and animous and eggs of ornitat I work of property of the wall to be the property of in recrack in the pairwill sy for our cat, The first is. because that the effice of chile eligibe at most let by Lintuite in Unapier St. same, Line to low- it thought at stated To path total the test believes the lift in all accepted Englys-CALLACTORY To each Public refraire, then him makened to were retrain mouth year to a relative required our reson the drawn but broited course of the trible on a ser calded so as Libraria to be served ogechante ones as going at a sit aron soit of al al elemnos or impared distincts complitions of a comparation and a comparation of the complitions of the comparation of the compar the court would pass usin the four completed of. In most reacaber harmanny desir none year to get I bi verterbe trult tabre at trult present and at severa so me of rame to Ferri Lyman ton odd plaint and the

The Jours in the mest of the specific of the his heath and the lead that freed on the cert of the specific press or the street of the section and the state that the street of the section and the certific of each and the section and state of the section and state of the section and the section of the same a certification obtained by dereas or freed, or shore by some cannot be section obtained by dereas or freed, or shore by some cannot be section obtained by dereas of the noncess, and ethem he could have cannot need to the securit sould have cannot need the trief has the securit sould have cannot a conviction. The facts, he seems to the securit sould have cannot a conviction. The facts, he seems to the securit sould have cannot a conviction. The facts, he seems to the securit sould have cannot be the fourth.

The other suggestion that seems to be urged by the defendent is the fact that the amistant public defender had stinulated to the value of 25 feet of telephone cable as being \$30.00. and that no evidence was offered on behalf of defections that would indicate others at but it one appear that the issue of Tile are before the court and that defendant by his attorney offered in evidence the witness, James J. Cunningham, and he testified that he fixed the value before the justice of the peace at the recliminary hearing of this matter t 0.00. It is augusted by counsel for the State that no doubt defendant's ocunsel had a justifiable reason for assuming that in view of the fact that sitness commingness had previously fixed the value of the property at B.50 that the trial court would, if he ere in doubt as to the value, resolve that doubt in favor of the defendant, and an the other band it seems that the court was convinced that the value of the property and 20.00. and so, in considering these facts, the question was squarely before the court. In Jould v. matson, 80 Ill. app. 348, 347, this court said:

"It is apparent from these authorities that the fact upon which the error is predicated, in order to avail under this writ, must be entter not part of the issues tried by the court, but something aliunde, which, if presented to the court at the trial, sould have absolutely precluded the judgment as rendered, and not a fact merely bearing upon the issues adjudged, however conclusive it might have been of such issues. It is at least questionable if the scope of the writest ogsmen law, and hence of the motion, shich is here a substitute for it, is not limited by well established practice to such cases as are enumerated in the text and decisions above quoted. But it is in any event quite clear that it has never had, in the practice of the comon law, a scope wide enough to reach any error of fact, which was embraced in the conclusion of the court upon the issues of fact adjudged. whether error in passing upon facts submitted or an erroncous conclusion, because certain facts, which would have been conclusive of the issues, were not presented."

This decision was based upon an action which was in the nature of a writ of error corm nobis, and in determining the question now involved, we believe it to be conclusive on the ausstion we have here. If the defendant wished to appeal from the decision of the court, of course, he could have taken the action to the appeals court and have the sourt pass upon the question as to shether the swidenes justified the judgment entered by the court. No objections were made — he seeks to overcome the force of the question reached

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for casualny that is view of the feet that situes a Unanimbed had previoually fired the value of the property of the Shet the tries court sould, if he repe in doubt or the scipe, recalled the device has the court in feet the deventue, and as the court has it court the the court was court and the the value of the property were 10.7%.

evidence the wirm se, Jenes J. - wandaghes, caf as tertiles that he fixed the value before the justion of the reson of the princip of this metter at 10.4%. It is engaged by enveral ter

This disclose was enset upon an action which was in the nature of a writ of error octan <u>nable</u>, and in determining the question nor inveneration we have need involved, we halfere it to be consclusive on the question of the court. If the defendant wished to appeal for the court, of course, he could have taken the settion to the appeals court and have the court pass upon the question as to skether the evidence were that the judgment subared by the court. No objections were

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by the court by questioning the facts that eveneerd on the trial.

It appears from the record of a find it that the questions before
the court below ere that the evinence did not justify the vardict
rather than that there is a concernment of facts through front or
subterfuge.

There was also a further question called to our attention by the States Attorney, and that is that the defendant is free on parole and for that reason, being on parole, that defendant saived his right to this appeal. However, we are not inclined to agree with the contention of counsel. It does appear that defendant is on parole, and that his release from the penitantiary is conditional. The conviction is still in force as governed by the statute, which is chapter 38, sec. 807, Ill. Rev. St., 1939, which reads in part as follows:

temporarily released upon parole, shall, at all times, until the receipt of their final discharge, be considered in the legal custody of the officers of the Department of oblic affire, and shall, during the said time, be considered as remaining under conviction for the crime or offense of which they ere convicted and sentenced or committed and subject to be taken at any time within the enclosure of such penitentiary, reformatory and institution herein mentioned. " " ""

Attorney by motion to dismiss the appeal, which motion was denied, but leave given to file an additional brief. In view of the fact that we have passed on the merits, it will not be necessary to passe on this question as asked by the state.

For the reasons we have indicated, the order that was entered by the court dismissing the ritten motion that was filed by defendant in the nature of a writ of error gorne mobis is affirmed.

AFFIRMED.

BUNKE, J. AND SULLIVAN, J. CONCUR.

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NORTH D. FILL LISTER J. DERONA

CHARLE Y. AND THE COUNTY.

MR. JUSTICE BURKE BELIVERED THE OPINION OF THE COURT.

ON July 15, 1939, Gladys Wittenmeyer swore to a complaint before a folice angistrate at Oak Leen, Cook County, Illinois, and therein charged that the defendant, Charles . . itchell, was the father of a famile child which she delivered on may 5, 1939. Defendent was apprehended. He was granted a change of venue from the Police Lagistrate to a Justice of the Lance. The latter heard the testimony offered by the respective parties and found that the child was born to the procedutrix and that there was prabable cause to believe that the defendant and the father. The Justice of the Peace required defendant to give bell in the ous of 1,000 to asser the charge in the Original Court of Jonk Jounty. In the Griginal Court a jury was waived and the cause was submitted to the court. at the conclusion of the trial the court found that the defeniant was the father of the child. A motion for a new trial was averruled, The court entered judgment on the finding, which required defendant to pay the prosecutrix the sum of 1,100,00 as follows: 1300,00 in equal quarterly installments for the first year after the date of the birth of the child, and the sum of 100 yearly for nine years succeeding the first year, also in quarterly installments. The defendant furnished a bond with surety, conditioned that he would pay the 1,100.00 as required by the judgment order. He then filed this appeal for the purpose of reversing the judgment. Defend at a theory of the case is that "the testisony of the aother uncorrecor ted by other testimony or by surrounding circumstances is not sufficient to convict where the defendant at all times denied any act of intercourse with the mother, or that he was in any way responsible for the birth of the child." The theory of the prosecutrix, as stated

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Cd July 15, 1 74, Lindys istemayer acore to a count int before a Foliae Englerate a tek in a, Cook County, Fillugit, and bett con all which the contract of the first bound of the bound of the contract of the contrac ther of a female child that we delivered on my E. 1939. and the transfer of the contract of the second transfer and the second the second transfer of the second transfer the Police Degletric to a Justine of the . The Letter orang ad tend then to see adjust with the real of laws to would and and o alcohorn and south first in winterson wit of mood one bilde age he sailed out amount his are spreaded out rack evelled as was no order to be soon out and him owing out standard to beautique, where Declarations on all these and to Paul Jonist's Mr of Witten and From the of least and the pure buy law howing new week of Prince Specialtical way read little Physic our Light way in goding then not be bilinears, and India was a self-sultree a "Right net To broket and and penaltic as well and the size of the size of the period of atch off tofter y out that the tree year ofter the tree year of the Wirls of the while and the sun of 1100 yearly for mine years suff .attendiatent virotroup at only prov toult out patheonous Nices of July Inchilities , others till hand a Sankistic Sankatab held and off 100,00 as required by the judgment order. He then filed of draineles . Insurbut out paienever to ecotion out not lawque aids fattroderrotes redice wit to yeomitant adta fact at each and to yeomit resisting for at consequences in the same of in qualified that's up -permit to two you improve would like as inchested and where followed course with the authory of hard he are in our our translation to harde as plansacro out by provide my "Alido off to style out

in defendant's brise, is "that the evidence adduced at the trial is sufficient for conviction."

The first criticism leveled at the judgment is that the testiony of the mother as uncorraborated. The second coint urged is that the judgment is not supported by the evidence. The proceedtrix replies that her testimony and corresponded and that the judgment is apported by the evidence. These two points involve consideration of the testimony. In order to better understand the case, we have errefully read the transcript of the testimony. Infare discussing the testimony, it is timely for us to any that, proceedings in bastardy, being civil in their nature, the rules of evidence th t govern in civil cases apply, and the eternity of a child may be proved by a preponderance of evidence alone and need not be established beyond a reasonable doubt. there the evidence is conflicting, the issue as to whether the defendant is the father of the bustard child is a question of fact. Likewise, the oredibility of the sitnesses, the wight to be given their testimony, the opportunities for intercourse, the duration of the period of gestation, the constancy of prosecutrix's accumation, are all matters which are properly left to the jury, or to the trial judge when a jury is anived.

In summarizing the testimony, we note that bladys littenmeyer, the prosecutrix, testified that in June, 1838, she can living
with an older sister at South eloit, Illinois; that the sister was
married; that she, the witness, was then 32 years of age; that she
answered an advertisement for a housekeeper, which appeared in a
Chicago newspaper; that she wrote to defendant, who lived at 3618
Cook Avenue, Oak Lawn, Illinois; that defendant replied to her letter
and asked for a picture, which she sent to him; that defendant drove
to South eloit on June 4th or 5th, 1938; that she accommanded him
in his automobile which he drove to his home in Oak Lawn; that he
told her she would have to take care of a "pair of twins that were
two and a half years old at the time and do the housework"; that hen

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wil need of last just out as belowed meloising fould out by to believe this to be a for the property are to those out to quantities entrant in . serilire : it is and and and independ in the transmitted in the contract of the c and the transfer on present to approximate and that soil or airt julgarnt is sopposted by the evidence, . there is a later of law . consideration of the training. In exist to moitrablemon enge, we have east that to account out the tight see bone or account. discussing the testimony, it is thenly for so to a y that, mercefices in begingdy, being sivil in their setare, the roles of tridrage the excess in civil cases ently, and the enterple of a relative of ar fur - ar rur curir sensitive to some sensouring a vd entrolished beyond a reasonable doubt. The entrolished it comadd to code to the a sociation will end and on or or the darking paintell To writisthese our sealessit, the time season a at hilde Surface the visueses, the sellet to be . Iven "he're terthough the encyteetiles for intercourse, the feires of the certes of constitut, the constancy of proveoutints seem which, are all arther ships are properly left to the fury, on no the tries to a ment a fury is a significant

In sussering the testimony, so note that closing the second start the prosecutarity testified that dure, little as the second start at least that all dure, little at the sixter at least at the sixter at least the sixter at least the sixter at a second and a sixter at the sixter and at the sixter and at the sixter at the sixter at the sixter and at the sixter and at the sixter and at the sixter and at the sixter at the sixter at the sixter and at the sixt

she arrived at his home she learned that he had four children: that there was an 18 year old boy, Charles Jr., and a 16 year old boy. Miliam: that in addition to the four children in the house save a woman named are. one burham and her 3 year old sughter; the on the organises and a house which he had made into two apartment: that tenents are living unstairs; that the presides occupied by the 5 Mitchells, the 2 Darksus and Hadys consisted of a min porch, a living room, a dining room, a bedroom and a kitchen; that one of the two older boys elept in the basement and the other one lept on the sun porch; that the twins elept in 2 cribs in the bedroom; that Cladys also slept in the bedroom; that defendant was a railroad san. and that his hours of employment varied; that defendant also slept in the bedroom "unless the older boys were up"; that if the tag older boys were up, he slept on the davenport; that she arrived there on a Sunday and that Wrs. Durham and her daughter laft on the folioring Thansday; that defendant told Wrs. Durham the toladys was his cousin who was there on a visit and that he was going to ask Uladys to stay; that was. Durbam said her aunt was sick and she left on Thursday; that on the journey by automobile from Josth eloit to his home defendant stopped out by the sirport and made an improper suggestion to her; that after arriving in the vicinity of Chicago he "drave around the city a while. He didn't know whether to take me out to his home on account of that woman being there"; that Oladys and defendant arrived at the latter's home about midnight; that she alept on the day bed on the porch; that the first time she had intercourse with him was on Friday, the day after are. Jurham and her daughter left, which she fixed at about the 10th or 11th of June, 1938; that the set of intercourse took place in the bedroom where the twins alept; that she also had intercourse on the following evening and thereafter three or four times a week until the first part of September, 1938; that her last menetration before the buby was on July 4, 1938; that the first part of eptember she found out that she was pregnant, that she had been sick to her stomech and diavy;

gamental and the term of the Lorentz and the translation of the contract of th the tropy of a large way, have level in a large with buy, williams the believed to the root which in the many owns no i de presidado de rela rela destina en della contra de in in the many of a strict of an and and and in a model a man gradinary add gd had then an drest near that the problem of the district of the adminest field .down are the terminan appear on account to the paleon to the living mean, a diming root, a bedress and . Mindress and of go tools ago take it as such as and mi tools agod table out the constitute that the sains are it is a crist to be a constituted to the Ampillon o has Amazoton Jose parecial ago at oppie sale achieved and donle sale racid to it resistant ventral police to emoca aid full lus in the beareon "andere the older any err or; the if the ten ered between the the property and the deals of the erre wood rable on a saming and then eye. Author and her combber lest on the fallowing thousandy; that detendent teld Now. outlook that the each bis concin the ec main are no that has their se wind and one nisees no that the time and the track of the medical and the contract Thursday; the on the journey of rule while rape during that is the bown defendant stapped out by the sirrest and wrise an imprenent suggestion to mer; the ever evering as the vicinity of thiogy he ddnews expand the city a wille. We didn't know whether to take me out to his bone on merents of the trans bring there's the Clarge ess test tiding to the laterta burn along the parties and determined the same alopt on the day bed on the careh; that time time she had latercourse with him were to tricky, the top after Mrs. Markes and her sugar left, which she thred or about the 19th or lits of June, 1979; enly todd ered mostled and all seals heat sermorestal to doe and asid che the the the time the invercence on the following evening end to over dead the time door a sont west the third or cord ertamber, 1938; thet her last semestration before the bely was se July 4, 1838; that the first part of lapponder one found out that the the doeses and of this west had been the the doeses are ado

that she talked to the lady upstairs; that "the lady upstairs told me": that she than talked to defendant about her presence, and that he, defendant "anid it - a s lie"; that later also had a further convers tion with his coult her gregatacy, and to the ent as home about the 25th of September and told me it was a lie, but he beet me up before that: that she sent back to her sister's home at South Deloit: that when defendant hired her he acreed to may her wages of 5.00 a week; that during the period that she are prainfor detendant she did not receive any salary; that she are now with her sister two days, and that her sister sent her back; that ahe case back to the Witchell hose, and that when she returned to air home, his wife was there; that she again talked to his about her pregnancy and told him that he would have to help her out; that he said "it wasn't his and he laughed at me"; that he sont her back how; that she returned to South Deloit; that she came back to Chicago in Movember, 1938, and worked for a family on the south side; that three months before the baby was born, she went to the Jefferson rark Hospital in Chicago for the mrrows of prenatal care; that she sareed to do work such as scrubbing and mahing in order to pay for the hospital and actical charges; that defendant did not call on her while she was in the hospital, and that a famale child was born on May 6, 1939. On cross-examination she stated that she was not a arried own, but that when defendent a lied on her at Wouth meloit she told him that she had been married to a sailor; she dealed that she wrote a letter to defendant in which she said she had taken a picture "for just that occasion"; she then identified a letter dated June 1, 1938, as the one she wrote to defendent; that the aldest boy Charles slept in the besement; that illiam, the 18 year old bay, alept on the sun porch on an arey sot; she denied that she at any time alept with illiam, and at ted th t he elect on the ray cot and she sleet on the day bed on the sun porch. The testified further, on cross-examination, that while she was sleeping on the day bed

ther artists by the levy applicant that the lay a state and me"; that she then talked to catend at an are regarder, and residuat o bar são resis resid ("são e se di bise" durboriol , ad send conversation with his close over correctly and the action boms about the "Silk of "subtemb we want to it to the " als, but ... 20 dough a training one one send in the said the exercise our end said South and the the chem defendant alors he refer the top hor galvene on the last and makes that plan a 00.1 to an exfor definition the till age receive on the ray that the definition ner stater the right and the sector sectors are region of redate red e as book to the ittemedal bears, it is it with the iteration to him ind successful at the set of the sets are offered as the start and pregnancy and told bis the terms increase that he care out; that he proof ford and rate and rest (the fe bed out and are aid a new 31" bine al openion of took one one of at this day of immuner ode raf and the train alone the mally of the party and the court and the three courses before the being me have, when we define and was their torse forested to mayour add not be and the ladings of their wer for at raise of lattle for Hapitiman or upon place of at postiton no ille den hit in the telegraph of content has letigod out while she was in the hossital, and that a female mild and born on my 8, 1818. On eros - reministion and whited the abe era not -Piolis Stant 9 and no hallen surenated and seat sod amountains s or helped and trolles a as below means had also tend and blot ada a made a least to act to the second of the state a store of paret respect a balticonal most and tradescent test took relations Lead to the the case to defend as that the eldest and his tone all out amelila dead them and all their colors we name on the sun rorch on an army out; she denied that the 't any For your and my ready and four harders has partitly did found and in the testified three on the sun porch. The testified threi in on ... the thit wills mas election the day bed

and William was sleeping on the army out, defendant attempted to come into bed with her, but that she told him that william was electing there and that he should have agre sense, a sen of him age": that he then went back to the house. She was then asked questions in an attempt to improce her on the obsist of ensure given at the hearing before the Justice of the Prace. The testified that "we told mer [Mrs. Jurham] that I am a cousin so as to have the respect of the community out there. No one them that I had had the boby until I went book there after the emby one born'. The denied that she did anything improper with respect to either of the two older boys. The admitted that she might have jut her are around the nack of either of the boys as a friendly resture, and that defendant "basled me out once because I was kidding with the oldest I was helping him out with his studies and I was mitting on his knee one day and he bauled me out for it." the further testified on cross-examination that she wished to change her testimony on direct examination to the effect that defendant had not visited her at the hospital. Bhe testified that he visited her once when she ras working in the hospital laundry; that he did not give her any money. the was also asked questions purporting to show that in the preliminary hearing she testified he had visited her at the hospital two or three times. The answered that she understood that he had visited the hospital several times but that she saw him only once; that she was informed that he had come there on other occasions and that it is a rule of the hospital that no information is given out "when you work for your delivery"; that at the time the laby was born she did not give any name at the hospital; that the baby was then twien to the Gradle, an infant asylum in Evanston, Illinois, where she mave a fictitious name for the father of the child; that "we were told that we did not have to name the father"; that at the hospital she was not maked to muse the father of the child; that the jeb of the hospital and the doctors is to deliver the child, and that they do not eare who the father of the child is; that while she

of later. It is imilat your outs no releasing on making inare a cital steds and place one or drawn arms drive fact oracle comthe bound a generation of Looks and beat agreement and seeds brice would be then each or the each of land thou each of goving Trains to since but me but do up i at domesta no al analtenno of the junging before the dection of the court of the testaffed that "se told her fire, extend on a serie courts as as to term the end that to a t the control of the same and the thirt that the being bein and . Those are you and note ment about twee I like yet d per and to every or the thir west of paiding the side side the meak of clear the boys as a relegion . There is the traffe and fill agints to a superced some the ow halved" t no assiste are a tar asidate with hits two wis anisiss was I .vod had been considered by the total of beautiful and are the first of the considered an vegetient can eye do be bedet, say that melical err-secte an ver Lagisly don In. In bushas for toxics and as neither the secul ado and come tra restaur of roll national add .i united add the une sed sein ten bit of sent grammed intigend and al maistee see min of the entrapper entire to tolar cell are sain appearance in a constant of the constant of and the west he finite has not bestified to an existent yearfulfer. took factorus and the terreses with the best to out it is the via, aid and one topic the senit lerence lesioned and bettate had off onner that and we informed that he had once there an other eccessions goods at maitrareint on fadd faricaed and he sier a of it full bas wild and and and se sent investigh mor not know usy made" suo yard and tear that the hood and to open you are the his ared are was then reden to une tradle, an infint asylum in tennion, illinein, where she gove a flatitions ness for the father of the child; that to just : "gradult and owen of area aon bit as and blos area on" rear thinks and he redtor and ones of bales for one had larigued add har ablide and wavilab of at average and has indicated and le to ade attile tone for billion and "a radite" and ade owns don ab was to visit a girl friend; that and did not no into Chicago shile

Mrs. Durham was at the house; that after going to Chicago she

arrived home at 10 or 11 o'clock in the avening, and that she did

not come in as late as 2 or 3 in the sorning. The testified further

that she had dictures taken but not for the purpose of sending a

picture to defendant; also that she told him that she had some

pictures taken for an "occasion just like this". The denied that

she had intercourse with any one other than defendant; admitted that

while she was at the Mitchell home she became acquainted with a boy

in the neighborhood by the name of Lou alters but that she was not

going with him; that sometimes the Mitchell boys, alter and herself

played games at the Mitchell home, or in alters's sister's home in

the neighborhood; also that she visited diverview ark in company

with Walters and others.

Antoinette Thomas, called by the People, testified that she lived in a house about 35 feet from the Witchell house; that she lived there since may, 1913; that she saw defendant abring this girla; that she saw defendant and the girl go shopping "or some place"; that she did not see pladys coming or going from the witchell home with anyone else; that Gladys was a "very good watch girl". Wrs. Wichard idems, called by the Feople, testified that at the time she testified she lived about a block away from the witchells; that formerly she sas a tenent of the defendant and rented the upstairs flat from January lat to Laptember lat, 1939; that while she lived at the witchell home she washed in the basement; that she was then asked. "are there sleeping quarters downstairs?" and she answered, "there wasn't when I moved but they have made up two rooms down there since while I was living there"; . " hile you lived there do you personally know who slept in the besement of the Mitchell home?" A. "Yes, cir." the then stated that she did not know Cladys, the prosecutrix, "last year"; that she met Uladys when she came back "this year".

The district of the site of th

vie and his a reign vi is the in one of the land and also all

etth elters and others.

and mend boilifeed release of vilouing remoult advantagesis fully regular financia and the same full at the second a mi how lived there cince May, Lill; that the ore terestent thein this this this togs : "apele anne to, est come an Iri, out the barlab ass out feds date and iledeall add mort paint to maisto appell one for his add supply that the first our rest and that the bare leiving on the loss is a testified that at the time the tertified ade pirents and tallamote and man't contable that therein and ment dell extendes suit bedann bus summered suit to immed a sec ade se bevil and alide sed: (Stil asal nedentgel at the ground sistencil ages she readed in the best that the see the capaliones. scart Arterial als the Wieldhood andress of 1986s Sinty stacomic wroat and emeet out on sim, and year and haven I made " neer all mester nery of croud bovil may alim's . ' ; "exemt privil a we I slime will seel .: "Taged Hadeth and to income add al igule ode send extranspart one did not know Madye, the presentation trest where this one see ale and stady state the trees it is The was then asked. "but you didn't see nor it may time then she worked at Mitchell's at all's and she answered, "Yes, this sugger I did. I saw her every day". The court then asked, "when did she come to work this summer, andam, in 1939?" The mitness answered, "I believe it ass in august". The further testified that her best recollection was that Bladys sorted in the Bitchell home in wast of this year, 1939", and that at that time the mitness lived upstairs. Un cross-examination she was asked if she knew how wis a wittenmeyer came to come back in August, 1939. The answered, " ell. all I know is that he went after her and brought her there"; that she say his bring her there; that he brought her there first on a Sunday and that she spent the day there. The was then asked if she would be surprised to know that the warrant was sworn out on July 15. 1939. The replied that she did not know anything about that. The was then asked, "But you are positive she came back there and worked one south in August?" and she replied, "I say she came back this summer and I thought it was August". The all o resserted that Mr. Mitchell brought her back. The further testified that Uladys had a suit case when she came back. Isabel Incedin, called by the People, testified that she lived close to the Mitchell home and that she did not see her (prosecutrix) come to or go from the Mitchell home with men. Mrs. Thomas allace testified that she lived in Freeport, Illinois, and was a sister of Gladys, and that she was taking care of Gladys's baby. The defense then recalled Gladys to the stand for further cross-examination. The was asked questions of an impeaching nature in an endeavor to show that on the preliminary hearing before the Justice of the Perce she had testified that she went out with a boy named Lou. On the trial she stated that she did so, but that Lou's sister was slawys present. She further testified that after the baby was born and while the baby was in the Uradle at Twenston, she came out and asked litchell for support for the child. She was then saked, "Is that the last time that you were out there?"

The see then sakes, but you dien't see her a my birm then the Termin said good glosovers wie has bille on elliminois to begrow I did. I sow nor every day", the sout them sered, "you will be contract this success with 1907al ti and a success and the care of "I bullere it was in August". We further testiful the less in less recollection was there disays worked in the kitemeth from in a sail of this year, 1939, and then of the time without lives nostaire. On avoce-enealmetion the an ale in the how her him "latenamyer come to come besi in caratt, Laft, Har converse, " coll. and that the term to the court over and the firm an area of the world I lie a me jurit were the engineer, and been juried and paint and who sale Southy and that she eront the day there, the or teen when if are all ylub so dee pro the farmer and field send of heart pro of bluer ods the topic and the did not the satisfier and being a policy REEL befrom bur want no d a so one swifting or may full before until non minir intel more win per 27 abrillione was loss "Messoon all When win tres intraprot o. In bei . Thought and this ideaed? I have remove of the state of th and a suit once when she come best. Inches Inches online by the tend has seen ilearly the case of the alternation of the believe, there's Limbili and sort on to at the (wirespect) toll the fon bib ale bone with men. Mrs. Thomas will destilled that the lived in per ade feld has appell to retain a nor har smallil grouper; taking cere of thedys's being defence then recolled licays to the arand for further eroser-resident. he was saked curations of on impropoling nature is an endosver to show the particulary hearing before the duction of the leace she had teathfied that the ment out with a boy newed iou. On the trial she green that she did beliefers and and the same states on taken a part of the first tent on that after the body was been and while the body are in the credia of ablate wit not troughe tot fladetid being has the energiate for the child. the wes then saked, "Is that the last time that you were out tim wate

and she answered, "le, he call in to my girl friend, and at then, bag and baggage."

The defendant, who is 40 years old, testified in his own behalf that he was parchasing the property where they lived; that he had been twice married; that he was divorced from his first wife when the two older boys were two or three years old; that about B years before the trial, he remerried; that twins were born of the second marriage; that the twins! "mother is a nervous sort of sound and the children got on her nerves and she just walks off and after she is gone a while, she settles down and somes back. The has come back on several occasions"; that she (his -ife) as in the home "one time when ilse "ittenmeyer was there staying"; that he is a railroad switchman for the anta Je and works different anitte: that he is on the extra board and works whenever hours are available: that Mrs. Durham worked there three weeks; that he had an aivertisement in the paper for a housekeeper to take care of the four children; that prosecutrix answered by letter; that he, defendent, in turn replied to her letter; that he drove to Wouth Weleit and had an interview with prosecutrix on July 5, 1938; that after a conference he retained her; that she (Cladys) told him that she was maried and that her husband was in the Mavy; that the statement that her husband was in the Mavy was repeated in the presence of others after they arrived at his home. He denied that he told any one that Gladys was his cousin, or that he heard any one say that she was his cousin. We further testified that Oladys came there on June 5, 1838, and Mrs. Durham left on June 13, 1938; that in the presence of Mrs. Aurham and the boys he frequently reprinanded Gladys for her conduct with respect to the boys; that Cladys would sit on Charles Junior's lap and put her arms around him; that he contioned her to stay army from the boys; that Gladys remained there from June 5, 1938, to September 18, 1938; that the cause of her leaving was misconduct with the boys; that he saw familiarity between Charles Junior and

and the annessed, "La, he are in to my ciri intendig out ou we then the bar and baggage."

The defendant, say is all your testilles in the conindra the was guit or a contract the more and the light the terms. this fact his soft hooverly as not and their and boild and bed and E thad that ; wie array wealt to be to ere eyed relia out aid hade years before the trial, he received that toil a very born of the monus lo isos evertos e el todros" lanier lai dell jerelyche basses weth her the odies tout out his serven yes no Joy norbite out he she is gone a while, one nettles down and comes back. he bee the first at a contract party and a chi plant and I gave an do of page one that then dies with the way of the contract of the in it is dual quartain dress this serves into all come and make mendesive bastlier pair laine are aread revenuer ears in bread evire and no ai ad want an man we do not take the will believe mental world do not and and to save but of the enderson a del taged but al inchesif obligates; that progestin assessed by Estery the be, defeatent, had been after a side of account on their excellent and all hellows again of an interview with provious ris on daily of 1775; that where a confirman he refolded her; thet one (closive) told his test are one return to Address the first commands and their partie all his not benefited the deal well make exente to concert the horseful and will odd at our equally dead one yes bies an feet beings an . wood aid to bevirte mission of any plant yes one was break by to the or since one He further teorified that along some there on June 5, 1938, and were to consecut and at fadt (Diti , il sant no stel control .cum because you not not reduce believely injurished to be not been appeared s'eniest referri un file blive aghair fout paper act un fençant diffe top and yet not used benefiteen of test tail become and too but part from the boys; that their remained there from June to 1868; to separate in 1981 the low power of her larger on shanning the tablet extract course prescribed was of Joseph Sept and

Gladys 15 or 14 times, and on each occasion as reprisanced her. The misconduct consisted of her sitting on "herles" inp. He stated that he also are uladys lie on the bed alongside of the younger boy. Milliam, and put her arm around him. He further testified that he did not at any time have intercourse with the prosecutrix and that he did not know that he was charged with being the father of her child until June, 1939; that in June, 1939, he was askeep and that she walked in and woke him up and asked him to go "downto-n and sign adoption rapers for nor baby. That is the first time the baby was mentioned; " that he told her he had nothing to do with the baby; that "she c rried on like she did on the witness stand and I went back to sleep and she left"; that he did not go to her and bring her to his house in June, 1939, and did not bring her there in the year 1939; that he visited her at the hospital four times and paid her money on each occasion on account of her selary; that hen he visited her at the hospital she did not accuse him of being the father of her child. He denied that he at any time attended to climb into bed with the prosecutrix. He further testified that the boys elept in the besement "a lot of the maner, 1939." He was asked, "Now about 1938;" and he answered, "Here is a receipt from the coment ann sho finished the salls in the besearch, deted October 19, 1938." He also testified that he saw Cladys hugging and kiening Charles Junior, and that he saw the same conduct by Bladys as to the younger boy illies; that she frequently went into Chicago in the evening and did not return until 2 or 3 piclock in the morning; that in the morning at breakfast in the presence of the boys, she narrated her experiences of the night before; that he reprisended her for so doing and told her to desist; that he first knew that he are accounted of being the father of the child about the middle of June, 1930; that while she worked for him, she asked for advances of ough in order to go into town, which he gave to her; that he spread to may her 7.00 a cok. On cross-examination/was asked whether,

Moder 13 or 14 time, and on some contrate to restimate her. The elected sensions of her sitting on Considers. It all the tant ha slam one cludys lise on the descendent to the vacage has. dilling and put har are as and his. se turther tertilet ther he Just the midurante with first and open and and one of the bib THE LA COMPANY AND MAIN ASS. In goods as and doubt agent Jam his and onila until June, 1876; thet in Jens, 1878, he we wince on that on' restrict or of will below his in all thou has al healton ada sing saloytion werent for her beby, that is the filter time the Lang this wir direct to talk ing the talk and training to do die this wir this and three I have breake a weekle, and me hill and will so being a sign built anive but most as any contain an ends : "What are him quality of Rend but to bis beens in dune, 1985, err aid not bring her three is the ling to a suit root and income and the heart that their aimse and plant the the comey on some cases in a constant of the allery that the the was prive to and course for his one insignod out to well bedinky dd bedeendde sgin gan de se deed nelweb si .bilde wad to weddel cline into bed with the representative forther testified that the boys siept in the bestudent to hat the sunner, 1836. We was park transa a st rath, teasure by part 1982 transa soll being the compat sum who finished the willoud the bencent, dated Cotoher la, less." He shee tentified the a de diedys her ing and kineins Charles Jonies, and the he are the can conduct by Clarky se to the younger her tilling that the frequently that into Onice of the craning and the net rever a or A of look at the mentions that in the scening of breakfes in the presence at the hope, she behave been and tend to be and the assertance and becomes fres went Serit on tody (Series) of and hiet has yellob on and and to elber out smedy blick add to world? Add mains to becomes on ad Jone, 1838; that while she worked for him, she shed for shruors of eson in order to go into town, which he gare to her; thet he erread security design per production where did also delicate and the security

when he hired a housekeeper, he always asked for a picture. He answered that he never requested a picture from any girl. He denied that he requested her to send him a picture of harnelf; that on the opensions he visited her in the hospital he gave her some money; that he had not given her any money from the time she left his home on aptember 18, 1938, until he visited her in the hospital in the apring of 1939; that when she left his how he gave her 10.35: that she left her sister's address as her mailing address: that he did not mail her any money; that he did not have any money to spore. On further cross-exemination as to whether he had asked her to send him a picture he answered, "I ion't recall asking for her picture". He was asked, "would you say you did not ask for her picture?" He said, "No, sir". He finally st tei th t he ams pretty sure he did not sek for her micture. He also desied that he seat her. He stated that after bladys left his home in leptember, 1938, she come book in October, 1938, and asked for her wages; that he told her he did not have much to spare, and that he then gave her 13.00; that the last time he war Gladys at the hospital on March 13, 1939, and that he saw her in the reception room; that he did not notice anything unusual about her appearance. He further testified that after the time in June when she came to his home and talked about the loption papers, she came back again the latter part of June, 1939. We finally enswered that Cladys come back about the 34th or 35th of June, 1939, and "stayed until the 15th of July". He further stated that when she returned in 1939 she stayed about half a month.

Here Durham testified that she was employed by the defendant as a housekeeper; that she had given notice that because of the illness of her sister she had to leave; that uladys arrived at the home on June 5, 1938; that she, the witness, left the Mitchell home on June 13th; that Gladys told her that she was a cousin of Mr. Mitchell; that the morning after the arrival of Gladys she saw Gladys put her arms around Charles Junior, and that she also saw her sit on

when he hired a bousekraper, be my go react to a curved. It sand the the never required a citiber of sent herowest indication to endade a the section of the betereper an and bedeath that ten tion, ad inticach has hi and bedisty on encloses and no manay; theh had not given her any wear remethe that it is it is his hose on optomber 18, 1988, antil he wisited her in he sorpitel and or the service of the san and the fell to gainge and ai provide printed the secondar of regula the State of Sant termen thet he did not entit her early county that his his her live out o may hous. And his redical of on mail mineranero redical mo .orngo ed har to send him a ploture ne commerced, "I best tree il coning for បាក បាន នាន់ នាង នាង នៅ នេក្ស ស្ថា សកម្មកំណែល " នៅកាន់នេះ សកម្មក្រី និកាស្រីក្នុងក្បាក់ picture?" He said, "to, sist, it finally it to the said of the bay and his lade within or in the service and rol in the bib of orne * Para tan mara tan mara sen ikal makara manda a on in Detoing 1878, and were the term that an experience in told her he did not have much be apare, and but his to then pro her Pl rones are legious sof an equals on an and deal and deal and deal (00.5) 1958, and that he can ber in the recorded ware then be dis und beli lived twifter all . twart to and sumin Laurau palifyan solden the distance will be the change of the cold and the stance and the time and To error the adoption payons also also been a the thirty payon to Hits agr then to deep and which the through a file it . Com to the or Abth of dune, 1930, and 'ernye' patit the lith of July". find freds beyede and Siel at twenter and name fall beinte rading

Hear Surben testified that she now employed by the defendant of housekeeper; that she had as notine that because of the illness of her safer she had as here; that cledye arrived at the home on June to 18th; that Gludye told her that the way a cousin of Ir.

(tohell; that the morning sites the arrival of Gludye whe say Gludye out or arrival of Gludye whe say Gludye

Charles Junior . inp; that she saw like unmindt between dladyn and villian dischall; that on the night of June 10, 1978, disdys left home at about 9 P.M. and did not return until 1 or 3 o'clock in the morning. Whe also testified that liadys and she are married to sellor. The further testified to t she, the witness, and the 96.00 a week and that she was paid each week. Charles E. Mitchell. Fr. testified that he was a senior in high school; that he saw Gladys the morning after her arrival at their home and that on that morning she sat on his lap, and that she kissed his good-bye as he was going to school; that like occurrences took place about 50 times. and that she conducted herself in like manner as to billiam; that she frequently ent to Union o after supper in the evening and did not come home until after midnight; that she kept company with a boy named Lou; that at the breakfast table she frequently recounted her experiences of the previous evening, and that his father rarned her that they were not interested in her experiences and to desist. William Mitchell testified in a similar vein to his prother. Cladys testified on rebuttal that her meight at the time one morked for the defendant was 140 pounds and that at the time he was her at the hospital her weight was 185 pounds; that then he saw her at the hospital it was in the day time and that the room was well lighted. The defendant, by his counsel, rand into the record excerpts from a transcript of the record at the preliminary hearing. These excerpts were introduced for the purpose of imperching the prosecutrity.

Defendant insists that the testimony of pladys is not worthy of credence. He says her testimony is inconsistent as to the picture. The testified that she sent him a picture in response to his request. He testified that he did not request the picture. However, on cross-examination, as to the picture, he was evasive. He said he would not say that he did not ask for the picture and finally that "he was pretty sure" that he did not ask for the picture. Defendent challenges Cladys's testimony that she had intercourse

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The right and the temper will me age that the lettered before the tion system absolute on the sale of the sale, all sales in the sales of the sales o of incinie to I litem most than his latter to the decision many the merchay. One wise the to the term of the warming. alor to a vention of the first test for the the contract but a contract but finital. . esimple ... as on a bior ela ana fant bas dage e Co.S' dr. testified that he are a senior is his ballier to the the no series of an error to invite the teste totation and expelle morning also sex on his law, and thet size attent his equi-top to be and the companies and the transfer of the contract of the cont the conducted because of the line to his property of the contract of the contr the framewally men to believe of the common the man year man and did no con bone to be a but in the first of the contract of the and allowed the court restlicted out of built pull from the b ved: 1 - 2/1 for the , illustrated of the theorem and the tree the as her perceived a corer hadrended for over gold o do too bourse design, willism witchell to wither in a sinter wein to bis seators. hogen and and any to incime the four latered as no initians by the Lo to got one at make out to tend the ormony fail or standard told woll the heapital are rulet world, soomes; in , case to see her at the Appril the same may the test that the same as a religious. The defendant, by his comment, red into the resers transfer from congress were believed and the booking and the All Principal of eroughs for introduced for the openion of isosocking the oppositive

Jefendent insires thek the testions of Clarys is not worthy of creinnes. He says her testionary is inconsistent to the picture. The testified that the seak him a mickure in response to his request. He taskified that he did not request the picture. To be recommended to the the did not request the picture. He did not set for the picture and the sold he would not only that he did not set for the picture and finally that we are treaty ours, that he did not set for the fine of the fine

with his og .. onein bout dune io, 1935, and continuing until the early part of september, 1938. Defendant attacks her testimony concerning her friendship with Lou Walters. Defendant points out that she gave the name of a fictitious person as the father of her child when the child was placed in the Gradle, and that at the time the beby was own the did not name the father. He mintains that re. ideas, a witness for the cools, testified that she did not move Bladys during the year 1938, contrary to the testisony of ladys that she first set her in the apring of 1939. He also calls attention to what he terms are contradictions in the testimony of Jidgs that the boys were sleeping in the basement during the summer of 1938 and to verious other alleged contradictions. The record does not show that Cladys stated that she talked to Urs. Idea in 1978. The did testify that at the time she became pregnant she talked to the woman who lived upstairs. Are. Ideas did not live upstairs at that time. The did not move into the Mitchell house until January, 1939. One of the contentions of defendant is that the prosecutrix lied then she anid that am of the Witchell coys slept in the passment. Wra. Edema testified that the two older boys elept in the base ant while she was living in the house. The further testified that during her tenency, there ere no electing quarters in the besent, but that too rooms were constructed there while she was living there. It will be noted that in the early part of June, 1838, the Mitchell flat was occupied by the twins, the two older witchell boys, Mrs. Durham and her daughter, the defendant and the prosecutrix. The apartment consisted of a living room, a dining room, a bed room, a kitchen and a sun porch. Cladys did testify that she told defendent that she was married to a sailor and that such state ent was not the truth. On direct examination she testified that defendant did not call on her in the haspital. On cross-examination, however, ahe admitted that he did call on her. However, there are important sircumstances that tend to corroborate her testimony. The testified that after she left the witchell home in deptember, 1938, on the

with him commencing allow its, 180%, and continuing antit the the president and stores inches and all the construction and after and the about the action and the cidebatical and a cinebat blish was aband with a marra sumitiment a te one and aver one and mile and a contribute and all tooche are blide and nothe . To send to induite the . There's east them been belt and are and the and and son its are real religion to any the second of the second of the second Madya doring the year 1934, contrary to the testimony of Hadya that she first med her in the swring of 1838, ... also will entit who fait part agree. To come ident and all receiptings one serve ad their af the boys our sleeping in the beautiest dring the court of left per gase from a toy ... sidefall described by all a rate out to the on the throw which thet obe being to are have a large and water grid as loning win open over appeal adm onth bill be fold gillend bill such to substance that had his andb. . The . whichen hovel one monor time. The did not move into the signific was subit done of life, life, gode feit kirtuseer eit i die et da dasteb be eneiteebase edt. Le ene ske seld that one of the libelial beyon light in the base onl. are. siles on the the the test of a little of the state of the the men living in the bondes the durbers teneraled that may ber denotes, there were no elevele, mark as in the branching out that tee rooms were nonetrached there entir ohe ere hirtog there. It mill be noted that is the couly part of June, 1988, the mitchell that was assented by the return the state of the periods, the larings and her stangeder, the defendent and the properties. The a gnorthed a mear painth a mear paintle to hadriese a mantrage restantial tions are true gladest lith extents unring new a law model to for nor premetate done fait has maller a as beirngs are ado seit the truth. On direct emminetion she testified that detenhent did and see her in the heaville. In space residention, because invested the task of the self-termed ... the self-task at legisler as Partitions and considers the attractors of her last senset married not so that the Mannata out of the sale of the series

urging of her sister she returned for a day or two about a month later, at which time the then wife of the defendant was in the home. Defendant also testified that his wife had returned and me at home at the time Gladys came there in the fall of 1938. When the defendant visited her at the hespital in march, 1979, which and about six waks before the delivered the baby, he stated that he did not know that she was pregnent. This statement seriously reflects on his credibility. He was the father of four children. It would be rather remarkable if he filled to note the ohanged chymical appearance of uladys at a time she was in an advanced state of oregnancy. He called on her at the hospital and must have known why she are there. He testified that he did not know that he was charged with coing the father of the child until shout the siddle of June, 1939, at which time Gladys barged into his home while he was alsoping and maked him to sign adoption papers for the baby. However, he testified that Gladys returned to his home around the 34th or 25th of June, 1939, and remained there until July 15, 1939. his testimony in this respect correspondes the testimony of are. tdems, who lived on the second floor of the Mitchell house from January to Teptember, 1939. The stated that defendant brought Gladys to his home in 1930. The slee testified that when Gladys came back there in 1939, she worked one nonth. Is have also considered the testisony of the various witnesses concerning the actions of Jladys with respect to Charles Junior and William Mitchell. It is remarkable that the defendant, after reprisending Gladys time and time again, nevertheless permitted her to remain there until the latter part of teptember, 1939, and again for two weeks in the summer of 1939, after the baby was born. The two boys testified that they were continuelly objecting to her attentions. The fact that she remained there for 3-1/2 souths speaks strongly in behalf of the truth of her testimony. It will also be observed that although the defendant paid are. Durham every seek, according to

distriction of any one or green and bury let add untake and to interp in top, of which hims the foundified the "Tivet as a la Cha bear. panel of the further to a fille aid ford helt lead wale surphered at the time Cladys ones there in the Fill of Line. Then the defeat at vigital level the beautif is in the vigit of of deed but to the all yeld had also been also been also deed gare It as year along along along and you and dad you too hib on his oredibility. He was the faller of the realityes, it rould I slevi be note our over or belief of li significant region of To see it is entropy at a set a said a de sybeld to sentropy grant word inco has latitud but to the boll o of the many sing the real field and the testified the test and the test has the charged wit heads line believed the redset the time charged of the the best bir skil begand office and daids to all and to . The six rel eror a related and to aid bades has patennia and However, he tentited that blodys resumed to its basitions of growers Sain or that of June. 1989, and now then their month July 18, 1979. his testiment in this riegest torreborstes to testiment of tre. Edgme, who lived on the second floor of the fitting on from princed resignable from Parists and 19882 (becaused of Traulity Clodys to his boas in 1975. The air actified that when cladys ones back there in 1823, the cortain one manch. The bars line conout will promo presenting poor void to promited all bouchts which of thirty with respect to Dayley American but thirty is a product that he estimate, where replicables they are and time equin, nevertheless essitting as to vession there until the letter part of Deptember, 1875, and reals for the works in the record at 1975, where the help have been the real large restance. They seem nonlineable reporting to bey reterritions. The part of t that she remained there for 3-1/2 months appears strongly in behalf of the vivid of her treatment. It will also be down and to of patients when your mind and the formation and foundation

his own testimony, he did not pay Gladys except in dribs and drabs. She left the Mitchell home in September, 1938, and he had her address, yet he did not give her any further sayments an her aslary until she was in the hospital in the spring of 1020, and although he did not see fit to mil ner any part of the blance he sed her. he visited her in the hospit I bile she as in an advanced state of pregnancy. After the baby was born she called on him. She then charged him with being the father of her child. The department. but returned toward the and of June and remained in his home about two weeks. At the time he allowed Gladys to reasin in his hour for to weeks, he know, according to his own testimony, that she are accusing his of being the father of her baby. The fact that he received her into his home after he know she was acquaing him of being the father of her baby lends strong support to her testimony. according to his testimony she left his home on July 15. 1939. is worthy of wention that this is the day when she went before the Magistrate and swore to the complaint on which the warrant for his arrest was issued.

This case was tried before an able and experienced judge, who had an appartunity to see and hear the mitnesses and to observe their demander. We are satisfied that the testimony of the prosecutrix has been corroborated by credible testimony and by significant circumstances. The trial judge believed the testimony of the defendant. We are of the opinion that the record shows that the People proved by a preponderance of the evidence that defendant is the father of Gladys Wittenmeyer's baby.

For the reasons stated, the judgment of the Criminal Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HRBEL, P.J. CONCURS, and DENIS R. SULLIVAN, J. DISSENTS. and the action and the colors of the color of the colors o the lost the Minkell agent as there is the best will grade to the atem see modified the tool order, for his oil set another Ted bear to bring of wid to story yet and line as six you for hib ad prote from the ne hi are the think in the second of the training of wicemands. Alter the will are wind and relief or him. then cherred him with acts one folder of him and green and and all the foot of the mark to have not become near user but mat weed the city of at average to below ad with and the and the sent , we alter from the sate of pullbrooms , would be , where our securing him of boing the fixer of her a cy, the feet that a To gir the same and again to title smen ain one ten bevisper being the fixner of new only little strong or at to les testinony, especial to his testinos one ist his true on joy it, test, it ade agains the all gard, all as aims a as malines lo garden as wid got to were and some my unicle as and us shows in asstaly all Absoral the Parcks

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FOREST PRESERVE A MALES OF THE PROPERTY OF

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COOK COUNTY.

A. PARKIN MILLER,

Appellant.

307 I.A. 243

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COUNT.

On October 0, 1938, plaintiff filed a complaint in chancery in the Direct Dourt of Dook County and the rain alleged that it -seized and possessed of certain real estate, componly known and described as the southeast corner of avenue J and last 118th "treet. Chicago; that on April 1, 1939, defendant and plaintiff signed and delivered a ritten seeled instrument hereby plaintiff promised to convey said land by serrenty deed to the defendant on the payment by the latter of the sum of 15,385.74 in installments; that the agreement provides that the time of payment shall be of the samence thereof; that the defendant falled to make payments as atimulated in the contract; that on Deptember 15, 1936, plaintiff gave notice of intention to forfeit the contract; that on October 1. 1938, plaintiff made a declaration of forfeiture; that the contract is a cloud upon plaintiff's title, and prayed that the contract be declared null and void and that the payments sade thorsunder be declared forfeited to plaintiff; that the contract be declared a cloud upon the title and that the cloud be removed by a decree of the court. Defendant filed an answer and a counterclaim. This counterclaim and seended counterclaim were stricken. Defendant then filed a second amended counterclaim. In this crimien we will speak of the Forest Preserve eal setate Corporation as plaintiff, and A. Farkin Willer, counterclaiment, as defendent. It appears that on January 9, 1837, defendant served a notice on the plaintiff that "because of your said wron ful ests I shall regard said contract as rescinded and no longer binding upon either of the parties thereto. I further notify you that the undersigned has in response of your demend for puscession

AND STREET OF STREET OF STREET OF STREET grammars of this least the second of the second sec in the Circuit Court to Steel Jourty and the circuit and the in a many plantage and deed from alregion to hearn sen ban borles provide the law to make to memore therefore out or bedianos Uniongs; that on arth 1, 1879, defendent our thrills, signal age Aminimo Missila. Presode ser estant before dessire e besevilet regard and hand be warned by all of the course to have blee to be the course of by the letter of the own of the 305.74 in instillments; the the the togethe and the out time dominated to out and deat soldward frameways supplicate as emitting this at incides majorital side study processes of introvien to forfelt the constront that on teacher it, 1784, sieletinio a decimal of forfather; that the contract to a cincil condition to complete and trust description and a Children on the the fact of gargarable class charges of the bio blow bus lieu more twile a plantage of the contract to design as hadelest the side on the the color of bovener of boole side beet the side of Defandant filed on anter and a counterpair. This counterplain one smerded countereless were atrioten, defendent then filed a second aw sai to to desertibe or mainten and it the top us talle affect on has distributed as not servered . The it would no daily excepts il . Incomplete as . in land to THE THE PERSONS AND PROPERTY AND REAL PROPERTY AS A PROPERTY AND PERSONS ASSESSED. at his believer as Metters him Swape Thus I agas approve the Congress bigolines upon widoled and the particle biorwise. I further nation

Endersons the based years is compared to any property and and benefit and and and

of the presises, scandoned the same and has placed the same at your disposel. And the undersigned hereby surrenders all claim to the possession of the end presises." Defendant in his counterclaim prays for a judgment for the aggregate of the payments on the contract of 11,83%. To. On October a, 1389, the court entered a decree striking the second amended counterclaim and denying leave to file a third amended counterclaim. The decree also found that the material allegations of the complaint were not denied by the answer and directed that the contract between the parties be removed as a cloud on the title, and that judgment be entered against defendant for costs. Defendant prosecutes this appeal for the pursons of reviewing the decree.

The first point urged by the defendant is that having received all the payments when the contract was in arrears and having during the course of ten years! dealing between the parties never indicated that it would insist upon the strict terms of said contract and having thereby lulled defendant into a sense of security, plaintiff could not resort to the strict terms of the said contract without giving defendant notice, and allowing a reasonable time within which defendent could protect himself from the forfeiture. The second point advanced is that after payment of #11,832.00 in installments paid over a period of six years on a contract originally for 11,650 and increased by the vendor making imprevements to 15,385.75," a sixteen day notice of intention to forfeit unless 4,440.69 principal and 1,394.16 interest were paid, was so unreasonable as to be in law no notice at alla. The final point presented by defendant is that the plaintiff having repudiated the contract and repossessed itself of the real estate. the defendant by serving notice upon plaintiff of its election to resoind effected a rescission of said contract, and is entitled to recover the sums of money paid by defendant upon said contract. as these points are related one to the other, we will consider them together. Under the contract of June 16, 1876, defendant agreed

of the premiers, abundanch the same and has placed the seas of your to one. And the undersigned hereby surreprises all civin to the possession of the sold precises. Present of the countercisis press for a judgment for the apprecise of the payments on the contract of 11,800.00. On Catcher 5, 1856, the court apprecia a series striking the second smended countercisism and desprise income to file a third emended countercisism. The docume slace found that the appreciation of the countercisism was find the countercisism the countercisism has contract on countercisism and directed the contract between the parties in compact as a cloud on the title, and that judgment be entered epithed defendant for contest of the contest the contract of the contest of t

The first point weget by the Autenbuch is they been pering the arests at our rection sat node atmosph add the baviscon buthe during the operes of ten years' doubles between the vertice him to was a soleta sub many delami bisos di deda bedeelkei uswas to sense a enul factorist balled yderedd galved ine foertues security, plaintiff double not remore to the strict terms of the orid contract vithout diving defendent motion, eas alleving more Timenia tonious place research addition with placement between the street acteans in the artist property of ne steay his to toithe a nove they athenitatent at 60.589,113 to a contract originally for Il. 660 and increased by the viniting raidrated to white out postnis a ". IT. and all or admissional gains over Jurisdad Salated, in how decimaling and readed maximum field out and paid, non so unrescontain to to be in less no metter of mil". The final point presented by defendant is that the plaintiff baring inteder four mid to livett benconcourt has tortino out bathlinger the defendant by serving notice upon plaintiff of the election to of helding al her toutine of soil contract a patecta pricate recover the sums of money paid by defendant uses said contract. resistance ally sy trades she as and hereles are estated seads at to me the contract of June 16, 1226, defendant agreed

to pay for the real counte the sum of 11,680.00. He was to pay 13,883.33 on the day of the signing of the contract and 1733.00 on March 16, 1927, and 1333.00 on the 16th day of each and every month thereafter until the entire sum was fully paid, plus interest. It was provided that:

"In case of the failure of the said party of the second part [willer] to make any of the payments, or any part thereof, or perform any of the covenants hereof on his part hereby made and entered into, this contract shall at the option of the party of the first part [plaintiff] be forfeited and determined, and the party of the second part [willer] shall forfeit all payments made by his on this contract, and such payments shall be retained by the said party of the first part [plaintiff] in full satisfaction and as liquidated damaged by it sustained, and in such event the party of the first part shall have the right to remember and take possession of the premises aforeanid. ""
That time of payment shall be of the essence of this contract."

It appears that on or before april 1, 1939, defendant had fallen in arrears in making the monthly installment payments and was in default under the terms of the contract; that on or about april 1, 1939, the contract of June 16, 1936, was cancelled by mutual consent and a new contract executed; that monthly payments under the new contract were reduced from 1933.00 a month to 1000.00 a month, to be paid in seventy successive monthly payments commencing on may 1, 1939; that commencing in April, 1939, defendant paid regularly under the contract until June 6, 1931, and made no payments thereafter except one payment on April 27, 1932, of 163.89. There were no other payments made by defendant in 1932, 1933, 1934, 1935 or 1936, and he never tendered or offered to make any payments under the contract after April 37, 1932. It further appears that on September 15, 1936, plaintiff served defendant with a notice of its intention to forfeit, the last paragraph of which reads:

"You are further notified that the undersigned has at all times been ready, able and willing to perform its part of said contract, and that the undersigned is now and will be, up to and including October 1, 1936, ready, able and willing to perform the vendor's part of the contract."

It also appears that on October 13, 1936, plaintiff served defendant with a declaration of forfeiture, and that when the notice of intention to declare forfeiture under the contract was served upon defendant, he did not complain about the length of time given him to

to pay for the real estate the run of Al,870.00. he res to be;

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In the comparation of the follows, and then come the nation of these within to deliver on the contract of many states of the self-on the self-on the deliver on the contract of the contract o

protect hisself. The complaint shows that he wade no objections at the time the notice of intention to declare a forfeiture and served on him, or at any other time prior to the actual declaration of the forfeiture. The complaint also shows that between the time the notice of the intention to declare a forfeiture and served upon him and the time the declaration of forfeiture are served upon him, no payments acre and or tendered; that defendant neither offered nor tendered any payment under the contract from the time the notice of intention to declare a forfeiture was served upon him up to and including the time of his filling his second amended counterslaim, or for that matter up to the present time. In Lang v. dedenbers, 377 Ill. 368, the court said:

"If a contract calls for successive acts, first by one party and then by the other, there is no breach by one if the precedent act has not been performed by the other. " " " wen though there were force in the argument of counsel that defendants in error by their action had suspended or postponed temporarily the right to insist upon a forfeiture, the siving of the definite and specific notice of April 13, 1314, of defendants in error's intention to declare the forfeiture furnished the proper basis for thereafter forfeiting the contracts. Monson v. Braden, 159 Ill. 61; at son v. hite, 158 id. 364. Counsel for plaintiff in error further argue that the result of the decrees is that a court of equity is lending its aid to enforce the forfeiture of the 1000 carnest soney. Undoubtedly, under the authorities, equity will not declare or enforce a forfeiture where it is harsh or inequitable to do so, (Tarr v. Stearman, 364 Ill. 110, and cited cases,) but all the authorities recognize that competent parties may make contract as to penalties and forfeitures, and that courts of equity, as rell as courts of law, will recognize the rights of the parties as to such penalties or ferfeitures. Mere a court of equity is not enforcing a forfeiture. The decrees simply held that the defendants in error rightly declared a forfeiture under the contracts."

In the instant case, the power of the court is not being used to enforce a forfeiture. Nather, the Chancelior declared, in effect, that the defendant could not recover the payments he had made because the plaintiff rightly declared a forfeiture. The position taken by defendant is that the plaintiff having regulated the contract and represented itself of the real estate, defendant had a right to resoind the contract. We are of the opinion that plaintiff had the right to forfeit the contract. It follows that the defendant has no right to recover the payments made under the contract.

For the reasons stated, the decree of the Direct Court

of Gook County is affirmed.

MEERL, J.J. COSCURA and DENIE E. SULLIVAN, J. DISHERTS.

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In the isotent case, the population dealersh is effect, the force a force a forceliare, that force a forceliar dealersh is effect, that check a feather the had well because the the defendant sould not receive the neglection to had well because the plaintiff rightly dealersh a fartisiture. The contract and defendant is that the claim of the real estate, desendent had a right to read astate, desendent had a right to read the contract that the central the test of the contract the contract the contract the contract the contract.

For the remembed, the darge of the Directs Sons. County is affirmed. ABBARL LIFICULD.

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GUY V. LEHMAN, Plaintiff (etitioner), A AFFEAL PROM

JAMES A. HASNAH and ARCHIE The s.

BOOK GOUNTY.

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307 I.A. 244

SUPERIOR COURT

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE GOURT.

On March 30, 1939, Guy V. Lehman, Harry Klinke, Joseph W. Vurphy and Lewis . Dryer filed . to count complaint in the Superior Jourt of Cook Jounty we inst Jesse . Honneh, Archie miker, E. L. Ohristopher and Jewel Yes Co., Inc. The first count averred that on geomber 15, 1038, duy V. Lehann ans driving bis automobile in a northerly direction upon sklan! wenue at or near set 36th Street in Chicago, and that the other plaintiffs -ere occupants of the automobile; that all of them were in the exercise of ordinary care for their own safety and for the safety of the automobile; and that because of various acts of negligence on the part of defaultants the automobile was damaged and plaintiffs suffered injuries. The second count charged the defendants with wilful and wanton sisconduct. lesue me joined. Defore the trial depan, plaintiffs dismissed the oase as to the defendants Jewel res do., Inc., and . L. Christopher, and also eithires the second count. The trial lasted a stak. It the close of the plaintiffs' case and again at the close of all the evidence, the court denied the metion of defendants for a directed verdict. The jury returned four verdicts such finding the defendants guilty and assessing damages for day V. I shmen in the sum of 8,500, for Harry Llinke in the sum of ED, for Louis . Oryer in the sum of 8,000 and for Joseph . Murphy in the sum of 500. On the day the verdicts were returned the court entered jud, sent the soon. In due time the defendants filed four actions for judgment not ithat and in the verdicts, one for each separate plaintiff. Defeadants also filed a sotion to set aside the verdicts and to grant a new trial. The court entered an order denying descendants action for judgment actThe real Property and where the same is to

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THERE I INTERPREDICTION FRANCES ASSESSED. on when the limb, buy W. Ithmen, herry Milake, Soperk .. marries and the second former to the first and the termination of the terminal no sent ferrors and dead for do., inc. The first county court the coorder 18, 1918, duy l. ichan . duting his attached in c teach district the track of the second school and the bearing in Chicago, and that the otion civility companies of the one premiers to enjoyee and at more made to its Judy publication grade and callingous and in grades and the greater and artific tell and the dealers to the partie manification to seek at combile men demaged and quelesitte agricered injuries. The garged to the darken de farments with the little will wonden adventure to Is no one joined, defore the trail or an alaintiffe dismissed the weeks at the definition to the last last of the threaders. it . Wene a botani laitt odr . woon' wood od wo the, plrintiffer or out north at the close of all the because a tel simplestob to motion odd beings from odd , depolive withing the party returned Town verifies and finited the party of the sullty and essecuting demonst the V. Lehren in the eus of 6,500. for Harry Elinks in the own of 180, for louis 4. Sayer in the sun of 15,300 and for deapph . Harring in the sum of 100, on she are the end all coursely remained the married program vice from the hard patherstadiated teamphot rol ancien work ball attributed and amis selfs only usualneted ittisulate adverges door not use tableter and ail . Laird one a seen, of her redience and ables on a see triel. The

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withstanding the verdicts as to all plaintiffs and overruled the motion of describing for a new trial as to try or, burnly and links. The court granted a new trial as to the claim of claintiff Guy V. Lehman. The latter filed a petition for leave to appeal from the order granting the new trial, which we allowed.

The instant petition is filed under a provision of Section 77 of the Civil Fractice set, (Far. 101, Oh. 110, Ill. New. Btat. 1939) which reads: "In order granting a new trial shall be dessed to be a final order, but no appeal say be taken therefrom, arcept on leave granted by the reviewing court, or by a judge thereof in vacation within thirty days after the entry of the order, on motion and notice to adverse parties." The provision is designed to promote justice and to prevent a verdict as readed by the record and justified by the evidence, from being set aside and lost to the party who was fairly entitled thereto, and such litigant forced to undergo the hazard of smother trial with the further incidents of felay and expense. (Lettaw v. Metail Hardware Mutual Fire Inc. Co. 285 Ill. App. 394.)

In order to determine whether there was an abuse of discretion in the granting of the new trial, we have a refully read the testimony of the mitnesses. On December 13, 1838, plaintiff was employed as a linetype operator at Coldblatt Brothers printing plant located at Parshing Mond and Molcott Street, Chicago, and Lewis Dryer, Marry Klinke and Joseph Murphy are also employed in the same plant as linetype operators. Their hours of work sere from 6 P. W. to 2:30 A. M. They all lived on the north side of Chicago. Lehman owned a two door 183% Chevrolet Coach. Plaintiff and his three fellow markers were returning home from work shortly after 3:30 A.M. Flaintiff was driving and Tryer was sitting alongside of his in the front seat. Klinks set on the rear seat behind plaintiff and murchy set on the rear seat behind plaintiff and murchy set on the rear seat behind plaintiff and murchy set on the rear seat behind plaintiff and murchy set on the rear seat behind order is morth and south highesty in Chicago. Set seen 29th and 25th Etreets, the seat

off neterious for a sufficient with products our economics the off selections for a new rate of the child of trainful on the the child of trainfill on the follows. The institution file for the lastest from the order prenting the new tries, which we said out the child of the chi

The inst-nt section is filed under a provision of cort. 77 of the Civil resting lets, (see, 30), the this this, the corp. 3600.

1839) which reads: "in order architics a new prior about he corest to be a finel order, but no appeal sey on their specifics, except on leave greated by the resisting ourse, or by a judic timeser in victorian eithin thirty appearance accurage of the vetter, to nowice and notice to diverse parties." Interpretation is incident to and justified by the prevent a vertice as a standard by the meast and justified by the criticals, and expendent of the the undergo the heavest of the the undergo the heavest of the season of the the undergo the heavest of the critical standard of the content of the content of the the undergo the heavest of the content of the

In order to inter the relief there is a since of the credity in the residence of the citarons of the citarons. In secular is, 1275, minimite one the instance of the citarons of the citarons of the citarons of the relief the confloyed as a limited of territy aliase and formal inspire of the case of the case is a limited and formal inspire of the case from the case control of the case from of, i. to a limited of the case from of, i. to a limit of the case of t

and west streets do not run through, out stor at the west side of shiand Avenue. The collision out of which the oction arose occurred on sahland avenue just opposite where 36th Atreet intersects from the west. At thit point shland Avenue is 70 feet wide from ourb to curb. with an unusual subdivision of traffic lanes. The space between the west curb and safety island for southbound care at 36th treet is 35 feet. all of which summe is for southbound traffic. The gafety island is 5 feet wide, then there is a space of ! feet between the island and the southbound street car tracks. The 4 tracks occupy a space of to feet 4 inches, including the space between the north and south street car lance. Inen there is a since of 13 feet : inches between the northbound tracks and the east ourb. At the time ashland avenue was widened by the city, the street car tracks were not moved to the center of the street. As a sonsequence. the southbound traffic in that area has more lanes and more freedom of movement than the northbound traffic. Plaintiff drove the car east on Fershing load to ashland avenue, wehre he turned north. On ishland avenue he drove into the space between the curb and the northbound streat car tracks. When he turned into shland avenue there was no traffic shead of him. but when he passed 38th Street he observed a truck in the car tracks proceeding north about half a block shoad of him. At that time plaintiff sas driving between 30 and 25 miles per hour and the truck was traveling between 15 and 18 miles per hour. The truck continued in the car tracks and Lehman continued to drive between the curb and the cur tracks, and when he as within TO feet of the rear of the truck, which was a combined tractor and trailer, the trailer being approximately 21 feet in length and the tractor part about 11 feet in length, he sounded his horn and flashed his lights from dim to bright and back to dim again as he was about to pass the truck. As he reached ismediately beside the tractor, the truck turned to the right and struck Lehman's automobile on the left side. The blow caused design beginning at the

to also the out to appear the papear of the educate some to harry to sense want of the sense to said to sell of the control of the first sense of the wert provinced towns and areas established and amore builded me the west. At that could as the are not yet with the court with to earn, with on unusual subliviates of training learn. HEAT to sta full minimistry to breaking forter has drug fully the aborded .nitters immediance not at even doing to ile .spot di ei Jeoust The natety island is 8 feet alie, then there is a se on of a feet trooks coopy a space of la foot & inch inch ling the money between the north and nouth street out laber. Then there is a amos arrive teas that a least the modificant tracks that I had the to the time chlade ever will include the chartest brother ever the tracks for and moved to the center of the street, as a consequence. the acutable and training the gree has been been and the freedom at more than the south the little . Which the train the est oand on Ferning ford to relient from a cone or turned north. and two drops and marsted same will only on the auth and the fine like there was no trailed since the paid to brain offices on new sund lied thods driver gainesport mines; were and all momes a havende ad a blook about of the time time plantiff on friends between TO end 20 miles per hour out the troop was traveling petaden 15 and le siles per hour. The truck sontinued in the cer tracks and helmon ed and the garoust tee out has due out account with of beanifnes handdeen a see dainy soort and he were and he seet OS winter are troctes and trailor, the trailer being approximately Il feet in length and the tractor part about II foot in length, he counted his horn and flashed his lights from dis to bright and hade to dis squin this of the true the truck. As he resent the true lately braid -other atmential footte bon thight oil of frame, done and protoc The blow crused damage beginning as the

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left front sheel, then the roor part of the Left Font fender, then the left door, including breaking the handle, and the left rear fender was badly crushed and the wheel dam ged. ins car out out of central and ever the curb and into the corner of a fence at the northeast corner of what would have been 30th Street had the street continued through at the east side of Ashland Avenue. The point of contact of the truck and the automobile are almost at the center of a driveway opposite 36th Street. A plat received in evidence shows that the space east of the curb on shland avenue opposite to where 30th Street intersects with Ashland Avenue on the west, runs for " distance of perhaps 150 feet from the building line to a "dead end" and is marked "unpaved". The map does not indicate whether this is a public or a private streat. There are two railroad switch tracks in this space, one on the north side and the other on the south side. Between the switch tracks is a space, which from a photograph received in evidence, is used for the purpose of parking trucks. Le assume that some of these trucks also had freight to and from the railroad cars spotted on such tracks. There is a driveway which lives access from Ashland avenue to this unpaved dead end space, which driveway extends in an easterly direction from Ashland Avenue. witness Klinke merked a photograph which shows that the point of contact of the truck and automobile was opposite the center of the driveway. This point is about 35 feet from the corner of the fence where plaintiff's automobile finally stopped. Lehman, Murphy and Wlinke stated that no signal of an intention to turn was given from the truck. The impact fractured the right knee of Lehman, breaking the patella into several pieces so that a one half inch separation of the knee cap could be felt before the operation to his anse. The operation, unier anaesthesia, was performed by an orthopedic surgeon at the County Hospital, by cutting open the knee about 7 inches, which disclosed that the upper half of the patella was in one piece, then

loft from theel then the room more in the left trade femiler, then the last to are including breaking the breaking and the last rear fundar one besig orneins and the short ter and the rear went in come" . To there and cini the case and tore has letter to the eds had deared gibl weed even filmer to be to tenned so welling and and: . sucred landers to the tree tall to be the tall bounded bounded . do depois the alignmence and has down to the foreign to Jales the center of triversy against Still Willet. . als to respect to which lacket he stur wit to face some said wall evole sometive bestern handles did processed from the west of allegers the west, runs for a listence of while of 100 feet from the building lime to a shad one of "to record surpress", For man done ore erear . Peerle elevine a ne elidar o al cina ventur escalbai while offers not not been process and the extend continue becalling and a si succes dedica not source: . . . la armo and so radio est has tok face al .sepacita an invisor de contrata de contra adapts dead to spee into anners at alterit painting to secrem adj Mone we hadden area heartime oil mark but of hinter imad only amara harlan nort mance ever deid verming a zi eraft to late edge-ved datal our court, until control overster he as testably direction from taking avenue. Witness Within a creat a probactering officerties are aport and to to ince to hair, and fait event dolde ens opposite the center of the driversy. This maint is stock If self-months of the course of the translation of the file findia or deal becars whill has whereat as minded about of find town is an intention to turn out it was the truck, is in income card saled or odd and arread to cord their odd beretoer on a state of the constitute of the constant the constant of the constant will state before the operation to ale mee, The specifich, not be complete adventable as he hardened are placed realist deids assist ? funds some odf some gairsus vo 1 1000 thin a nedd tooky and hi as alloten out to thed renge out tedd

there was a one half inch separation with the least half being in several fragments. The noft timme was neved together and heavy wilk put around the broken bones. Your souths later large should that the fragments were held to ether by fibrous tissue and not bony healing, which condition is permanent. At the time of the trial, plaintiff's right knee was three quarters of an inch larger than his left, his right thigh was analler than his left, he had a 35 degree less bending in his right knee and a 80 percent permanent disability. He limped and suffered pain, particularly in cold weather, and sould not do his work as before, which work required that he sit with his legs under a linotype aschine on a chair 2-1/2 inches lower than a normal chair. Plaintiff also sustained a cut in the forehead in which 7 sutures were taken, and a cut under the chin which required 3 stitches. He remained in the hospital from December 15, 1938, to January 37, 1939, during which time his right leg was in a cost, and after his return home he was in bed for about 10 days. He was up with the wid of a crutch for a cok and used a came for the following three souths. He returned to wrok on February 6, 1939, at the time of the accident, his carnings were 61.00 per seck. He had been working as a linety or overator for over 30 years, and was then 42 years of age. The testimony of plaintiff was corroborated by two of the accupants of the automobils. Murphy and Klinks. The other accupant, Dryer, had no recollection of the occurrence, as he are rendered unconscious and remained in that condition for some time. The defendant Archie elker testified that he was an auto sechanic and that he was testing the truck on the street after having made minor repairs; that he drove as far as Demen avenue and 35th Street, and that immediately before the occurrence he was driving the truck northward on Ashland Avenue in the northbound street car tracks, with the left heels at the left rail and the right heels overlapping the other rail. He at ted that he intended to turn to the right, or east, in order to drive the

al relatives, the same said the additional find and a property the out ereated the everen cours countries to be a reverse to be a record the har evenif encedit to restance him over administrate but build bony healing, which con water to water or it and him of the reprise the control of the control of the control of the length then his lose, the right thirt was amile that the last the tan iner wise theere file all estil idet old at inthese and antick as discoultity. He lieped out suchland out to be will all additionally and don transition, and as four aid ab deat blue for a redictor Aler mings one emideen supposed in column applicated the sile and foods the a management of a Trinstall . Timbo Lamen a main reach actionic and represent the which ? returns over the end a con the miles the shid which remised 3 activities. We remises in the logistic from December 18, 1938, to January 77, 1932, 6.ring which wine his right leg am in a deas, such acter his return was he co in bad gen a rat grange a to bis this the res off aged Of about to? and used a come for the following three months, we recurred to wook on lowerry 6, 1854, it the time of the socient, his evinium were itled you reak. We had seen arking see linesyne accordes for over 20 years, and one then di pours of see. the tracipour to plaintiff was corresponded by two of the errowants of the submaching to melicalizers on hel . Tyer, the want of the one receiled in the there is post at hardener the conformation betcher our of an acceptation out Initiative temper states, produced will, would have not excluded so showed and paldons one ad this but chandes often in une ad test the averet efter howing more show repairs; that he drawe as for se Demon arones and both bracet, and that brandinely before the ni augar kucidat an karmaran bourt ada palvirh par ad senerrusso the series also also the sub title paleant two dearts involution and and besate all that reits out miduality out the Limit the State of the Limit out stirb of rebro at them to their od of arut of behaviat on

truck into the space but sen the reilrost trucks op osite 70th treat. He st ted that men he not within 50 feet of more he intended to turn, he applied the brakes and lit the directional light, which was on the right portion of the cowl above the headlight. He first gaw the place of the lights of the automobile shen they were right at his truck and the car passed on after it struck his truck, went out of control and hit a fence. He also stated that before the occurrence he turned his wheels to the right about 1-1/2 feet "to warn anybody". He said he did not see what part of the automobile came in contact with his truck and that after the impact he sat quiet until he saw no one moving in the automobile, when realizing someone might be hurt, he want over to the automobile. He further testified that the truck are a tractor and semi-trailer, about 32 feet over all, that the trailer was about 10 feet high and the tractor cab & feet high; that the width between the wheels of the oub was 7 feet 6 inches; that the wheels on the trailer were duel, which added an additional 8 to 10 inches on each side, so that the space between the sheels in the rear was about " inches more than in front se the front wheels were on a line with the inside dual tires: that the body of the trailer overlapped each sheel about 4 inches; that the front fenders were about 6 inches wide, directly over the sheels, and that the headlights were between the femier and the radiator. He stated that he did not have a mirror or anything else on the cab which would show what was coming from the rear on the right, and that the directional arrow showed only on the front and back of the signal and not on the side. He said he turned the wheels to the right as a serning to any approaching vehicles. He also testified that there sere stoplights on the back of the tractor which automatically went on when he applied the brekes; that the space where he was going to park the truck see clear and that he could have turned on a 97 degree angle. James M. Jacobs testified for the defendants that he was a chauffour for James A. Hannah, one of the

tages. Side allected breaking and assembled these alless and assemble of knipping of trace to cost in middle toy of noise fact had to all ourn, he applied the brakes and lit the directional in at. series of the fight period of two days to notife the first and and are of it ones your main aligness .. and to exhibit out to exalt out one of his tivel and the say pound on "it it struck his tayor, and sealed fold belong only of . south a fix has Louised to two securronce be been been about to the right according to the ate alidometry agt to tree true one too his at him at a too for a too for a true the of terminal test to the four in mit a forther at the court anivillat med , elidensiya add ni jaivae eno on tes al lidau saipa compone might be hart, he want noted to the maconia. He forther to type and the three bes retained any down one that balling one har fall tool of took - and taliet out and the the torn fook aff to picope and no what diding out and twice hard I don totage? led eres thirt this as along to a figure and the tree of add that on ania there on aming of the Langetting as babbs deide appear to be transfer in the course of a suggest of the manufaction of the course of t faut ariant wit sitte cult a so or a closer mort and on that at A tende found fine boundary relief out to place the tall torit inquest first tim, from tensors with themes wills, throwing and whether and one obtained the best between the forth and the reductor. He stated that he did not have a writer of eds no rear est mort private and take work bloom dain day and as as a bur thout sat no time threat rouse inneisorable out and bus addit eleanr and heart at him all , whis out no for her lengte out to sond to the right as a verning to any approaching vehicles, de clao toutified that there early highlace on the best it the tractor which study make not four paralest may deallow and under no force plantification. he see going to park the truck one clear and the of many account have turned on a 40 degree angle. James M. Jocobs tentified for the the first of the f

defendants: that he is orking on the shift starting at 7:30 4. 1. and that at the time of the accident he was standing at the door of a garage, the north side of which garage and located on the sant side of Ashland Avenue, about 10' feet south of the uncaved stace; that there were two entrances to the garage, the south entrance being about 175 feet from the lace of the collision and the north entrance 135 feet away. He stated that the automobile me right alongside the truck when he first was it, and that when it not to the front end of the truck it swerved and smashed into the corner of the fence and that he ran right down to the car; that when he first saw the truck the headlights and directional signal sere lit. On cross-examination, this witness stated that he was in the north doorway; that when he first saw the truck it was about 18 feet northwest of him and that the other automobile was exactly opposite it, about 6 feet in back of the truck; that when the truck passed him it was going 8 miles an hour and was slowing down as it went by him: that the truck stopped when it was 55 or 60 feet from the driveway: that he could not see what was taking place between the left side of the automobile and the right side of the track, and that he could not see that came in contact with that. Fronk ohner, introduced by defendants, stated that he was a chauffeur for James . Hannah. working on the same shift starting at 3:00 A. s.; that he parked his automobile on the rest side of ishland weame about 60 feet south of the north door of the garage and crossed the street from west to wast; that he let the trues go by aim in the northbound rail of the street car tracks; that he caw a car coming from the south in the northbound rail and ran to get on the sideralk; that the cor continued in the northbound rail until within a few feet of the trailer, then swerved to the right between the curb and the tractor and past the tractor into a fence at the corner; that he did not see the truck and the automobile come together at all: that he ran down immediately and then went to get help; that he

and all well be understo fille at an addition on all look palestockets. to their our in the case a men appliant and in the fire this to lead free tane odt na istresi der Sansay doidt la tile diae edt engemen a 1927ca . Truca war in Style for Ci rools , sunava be light to obje sometime with a size of any and of coordination and represent that alfrom red has assisting out to many and appl Jone bVI tune galad this was aligner on the state on the state of the state of the same at the st news Just buy the her deres we come about the ablements the front case to big the selection of the transfer and on med. sould the ear of anne suite use and but be senst and to All two Legis limits out to profit the art for the line of the lin On organomatically this eithers street that is easily by nath -times seal if there are if the time to see the deal fine the it tristed tisted are elicentry this out full has mid to room min because of and and trad throng and to do d it took & dayed teld to have the an much policele on han much as while I telled out the two wite wir many deet in the ill and di near hanged found and dade alls eral and nearled be to public and dade not you bluce of fold the control and the right alight and the track, and the elidemost and he hundler to a come to another the state of the court of the colors of the by defendants, stated that he was a shauffeur for doung . Heanth, bedier, od a da q. H . A Cots de palarede ables emen out se gullirou sear it tuese comert har limite to which from out no clidonatus aid ment describe not the means has again and to tech stron and to dinos inundriven sat ai sid ya on sourt sat this druk there of two and noted understoom when is not my state partners has design our be iden south in the northbound rail and ren to get on the cily their the our continued in the northbourt reil until within a for feet her drue and the fold their belt to berrow and trainer and to ind transco sais to tenst a cont recourt sat the county that place to widowald man additionally off hat payed not use for hit as the season of the season season to get help; thet he

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ser the stopic ht and again that on the trailer. Upon proceexamination, this situes at red that her he was half my cross the street, he saw the truck 300 to 400 feet way; that he continued to walk in a normal way and let the truck go by in front of him; that when he reached the northbound rail the track are stopped 75 feet away from him; that he looked at the truck as it was standing in the northbound real; that he then walked wast and looked north, not while he was standing in the track, but while he was standing on the eideralk: that he walked over to the sidewalk before he looked north; that he saw the truck down at the corner caposite 38th street; that when he looked north the automobile was at a northwest angle from him about 15 to 20 feet and in the northbound track; that in the meantime the truck was still atanding at the corner and after the automobile got up to the trailer it granved to the right and continued in a northerly direction past the truck, mybe 5 feet from the trailer, and when it pessed the trailer it went on an angle toward the sidewalk; that he did not hear any crash; that he did not see the directional light when the truck passed him but eaw it for the first time after he reached the sidewalk.

withstanding the verdict, and in denying the actions for judgments notwithstanding the verdict, and in denying the action for a new trial
as to all of the plaintiffs, except Lehman, necessarily recognized
that the plaintiffs, including Lehman, had established by a preponderance of the evidence that the defendants were guilty of
negligence, as charged in the complaint. This ruling also makes
it plain that the trial court was satisfied that no errors had been
committed in the trial. It is apparent from the record that the
reason why the court granted the motion for a new trial as to Lahman
was that he felt the verdict was against the manifest weight of
the evidence on the question of contributory negligence. The complaint
charged defendants with having failed to comply with the requirements
of Sections 65, 66 and 67 of the uniform not regulating traffic on

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The trial court in denging the solions for judgment not with with middle the vertical state of the vertical state of the picinville, excest ishes, measurably recognised that the picintiffs, including ishes, as extendishes by a proponderance of the evitence that the description willy of negligence, as charged in the complete. This relief slat color that the test the trial court was estimized in the trial. It is a prent from the record that the countitied in the trial. It is a prent from the record that the

highways, (Far. 162, 163 and 164, Oh. 35-1/2, Ill. Rev. Stat. 1939) which read:

"65. (a) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with responding an acty and then only stor living of only udible signal by sounding the norm if my adestrian my occupant or freeded by such movement or free civing an appropriate signal in the manner hardinafter provided in the event my other vehicle may be affected by such movement.

(b) A signal of intention to turn right or left shall be given during not less than the last 100 feet traveled by

the vehicle before turning.

(c) No person shall stop or suddenly decrease the speed of a vehicle lithout first giving an appropriate signal in the sanner provided herein to the driver of my vehicle is editely in the rear then there is opportunity to give such almost.

66. The signals herein required shall be given either by means of the hand and arm or by a signal lamp or signal device, but when a vehicle is so constructed as loaded that a hand and arm signal sould not be visible both to the front and rear of such vehicle then sid signals suct be given by such a lamp or device.

67. All signeds herein required given by hand and arm shall be given from the left side of the realch in the following manner and such signals shall indicate as follows: 1. Left turn - hand and arm extended horisontally. 2. Light turn - hand and arm extended up and or moved with a sempling notion from the rear to the front. 3. top or decrease speed - Hand and are extended downward."

.e agree with the contention of plaintiff that the testimony in behalf of the defendants admitted either of the following facta: (1) that defendant alker same up to the place of the contact, turned, stopped and listened, and then lit his directional light, or (7) that he lit the directional light within 50 feet before he turned, and not 100 feet as required by statute. As the court, in effect, found that the defendants were quilty of the negligence charged and that such negligance was the proximate cause of the injuries, the only cuestion is bether Lehman was quilty of contributory negligenes. according to the evidence, the truck as proceeding north in the street car tracks. The truck driver did not see the automobile before the time he saw the flash of the lights, just before the impact took place. There is no evidence that the plaintiff and driving at a high rate of speed, in fact, it is clear that he was driving at a reasonable rate of speed. He was driving in the state between the street er tracks and the curb, and he had . right to expect that if the truck was to be turned to the east that an

harmanga, (come lett, lett, come note, come fall, falls over them. letter)

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mi gamblets with but Priville to moth down out After says of torow the last one to be the destrict entered but to the des that defendent which or as as has been the content, terracial seds (1) to the in the expension of the and the framest the barress to alt the directional light within by for burger, on topsel, on to the the truety it wifeet, when not ICO feet on required by straute. to his har him to be a man things out to thing ones observed but tout men negligenes of the growingte case of the injuries, the only posterilles yesteriven to ything or mended tedlety as naitabur end al along patherous are topy; out , manifes and of patherous sidentian and has son his truit, house the true to the tile ody outled the the the the limit of the lighte part before the Tange is no evidence th t the plainfiff one . world Mood formal driving at a high rate of speed, in fact, it is olest that he and driving as a responding rate of speed. He see driving in the agree at sager wheel and and the curb, and he seems and no took from our of hourns of of a ... Hours

appropriate size I would be given. Detendents of the tir was the duty of lehran to mas the truck on the left. It is obvious from the unusual subdivision of the traffic lance, and the fact that the nuterobile - a proceeding north in the lane between the atrect car tracks and the curb, that it would be unressonable to expect plaintiff to was to the left of the truck, nor sould it be ressonable to argue that Lehman could have expected the truck to suddenly turn right from the street our traces to organ a space of about 1º feet. The question of contributory negligence is one which is precainently for the consider tion of the jury. . . e do not believe that any one on reasonably as all the verdict on the ground that it is excessives The injuries were serious and are of a permanent nature, and ac are satisfied that the sum of 6,500, which the jury awarded, is not unreasonable. It are of the opinion that the action of the trial court in setting aside the judgment was a plear abuse of discretion. Therefore, the order of the Superior Court of Cook County setting saide the judgment and searding a new trial, is reversed, and judgment is entered here upon the verdiet in fovor of the plaintiff, duy V. Lehman and agminst the defendants, James A. Hannah and Archie malker, in the sum of 6,500, blue interest at the rate of 5; per annum from February 7, 1949, in accordance with the provisions of Section 3, Chapter 74, Ill. Rev. Stat. 1939. ORDER REVERSED AND JUDGMENT HERE.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

now it wast never educations. and binos length education the dust of lephon to was too tries on the lette of the from the unwerl equilitation of the reaffic i sea, and the fact that the sutantial was recording negth in the head to be reen the effect the Spanne of effere the so lines of real party of has except mee alkengeesy of the bloss can proved that he be not set to be reasoned thinkells ares three ine of Mayor sais leasure even blood and said says .dash if should be to seen anger at allowers to the trade out more thinks. ligate and a delice and all suscellines years in head to neither of see you fill tysiled for ab a. . your ad: is maintained covingency: at at and important no follows that the an ilderensey no the injuries serve serious and are of a percentage serve asiry and at the the son of the his has jury nearded, is to send a sevie a service the judgment one a street thirty decretion. Therefore, the order of the Pourter loury of Com an alternative rate of the party one are the property of the party of covered, set takens at course are are a vertage to present of the plaintiff, our W. Lebert and against the defender, James is Hennyh and Archie wiker, in the tyn of [4,874, and interest at the rate of by yer same from isbreary 9, 1360, in assurance with the provincess of Section 3, Charter 74, 111. Nev. Nat. 1833. AND THE THE PARTY OF THE PERTY OF SACRE

NAMES, P. J. AND SMARN R. BUILLY IR, J. CONCH.

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CHARLES M. UFITAM

SAMUEL KEAR,

APPEAL FROM

MUNICIPAL COUNT

OF CHICAGO.

307 I.A. 244

MR. JUSTICE BURKE DELIVERED THE CAINION OF THE COURT.

On September 7, 1939, Charles M. Upham filed a statement of claim in the Municipal Court of Chicago against Samuel Kerr and Claire M. Jerr and therein averred that in June. 1939. he ama a licensed real estate proker and was authorized by defendant to obtain a perchaser for certain real estate locates at Altaeld Street and Marlem avenue, Jhicago, for the mum of 15,000; that defendant promised to pay plaintiff a commission, if the latter succeeded, in accordance with the rates prescribed by the Chicago weal istate word; that plaintiff obtained Charles . Mirach as a purchaser at a price of 15,000, who was and is ready, willing and able to purchase at such price, and that thereby plaintiff carned the sum of 750. Claire M. Kerr was not served with process and did not appear. In an affidavit of defense defendant admitted that he authorized the plaintist to obtain a purchaser for the real estate for the sum of 15,000, and that he promised to pay a commission in secondance with the miles of the Chicago Real state Woard; that such authorization was given on June 27, 1939; that such authorization gave plaintiff the enclusive right to find a purch ser for such property for a period of two weeks only, or until July 11, 1939; that plaintiff did not within such period procure a purchaser; that on July 11, 1939, the authorisation expired; that defendant did not renew the authorisation and did not at any time thereafter employ plaintiff as his broker; denied that pursuant to the authorization plaintiff obtained one Charles B. Mirsch as the purchaser, and that Charles S. Mirson was then, or at the time of the filing of the affid wit of defense, ready, willing and able to purchase the real estate at the grice of 15,000, and denied that plaintiff had corned

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in testador V, lity incres to the filed of the sentent bee rure incred tente to provide to trad localizate and at alala to clairs is Mary and therein veryed to a the and, 1988, he was a licenced total actual the terms of the property of the because to alogsi so the oct of the feet alocate the chrysta a minute Judy ; " () . I to a - and tall games and a main is the Joogs! defendant provided to may laintiff - consistion, if the letter expected, in which were this return according by the distance s as double . mained contains tileated fort (brown without Irot parelinear of a prime of the contact of the secret as the content one former Widniel your driven by abit does to predering of olds the sea of PHC. Lielze A. Wer can not served citle present out deals feetile . describe constable to dividitie as al . decays son bio he matherised the plaintiff to obtain a corologue for the real section ni noiselance a yes of hedger as feet but . I all to sue eas set dean pare' south les ar the end by solutions and dile conclusion such sutherisation was given on Jone 77, 1988; that such authorisation given plaintiff the enclosive sint to find a parchases for such preparty for a period of two state only, or until duly it, 1930; that plaintiff and not within such proton protons a purchaser; that on July 11, 1959, the matherination empired; that defendant wid not renew the sutherished and die not st ony time thereafter enday plaintiff as his broker; denied that cureuent to the authorization claimisty abrained one distinct to Mirack as the purchases and that our to milit als to eat the time of the filing of the foot out seedored of sine and the ready account to dividition braves bed Tribuleic teds being bun (COC, d. jury and resulted in a finding and judgment for plaintiff and against defendant in the sum of 750, to reverse which this appeal is prosecuted. Finintiff's theory of the same is that "he was sutherized by defendant to sell certain real estate owned by defendant for 15,000, and that having produced a marchaser who was ready, willing and able to buy at defendant's price prior to refusal of defendant to sell at such price, he has therefore samed the commissions agreed to be paid." The theory of defendant is that the authorization "terminated by express limitation on July 11; that if it extended beyond July 11, it was terminated by the declaration to the plaintiff by the defendant on August 8 or August 14, that the defendant would not sell the property for 15,000; and that the plaintiff is barred from recovery by his breach of faith in with-holding from the defendant information about the 350 Kroger lease."

The first point urged by defendent as a ground for reversal is that "the promise of an owner of real estate to pay a broker a commission for negotiating a sale of the real estate is morely an offer of a reward, where no consideration is paid for the promise, and the owner has the right to withdraw the offer at any time before the broker has done that for which he was to have been paid without making himself liable to the broker." The defendant does not challenge this statement, but asserts that a real estate broker employed to make a sale of land, who, prior to revocation of his authorization, procures a purchaser at the price fixed by the owner, who is ready, willing and able to take a conveyance and pay the purchase price, has earned the compensation agreed to be paid. Therefore, there is no substantial dispute between the parties as to the law of the case. e agree with the contention of plaintiff that in a case tried without a jury, the findings of the court upon the evidence are conclusive of the facts unless there is error of law in the proceedings, or unless the findings are so manifestly

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commission for acyclicity a sele of the relief is selet is selety in offer of a record, where he considered he is a selet for the construction the construction that the construction that the broker has done that for which is not to been that then before the broker has done that for the construction of the confidence of the affect to reverention of his cuthorization, produces a pure select that prior the reverention of his about the conveyence and my the purchase prior prior that anythe that a conveyence and my the purchase prior prior has anythe than a conveyence and my the forest the anything the anyther that action of the bound. Therefore, there is no substantial dispute hot can the parties as to fore less of the case. In open with the contention of civilitit that is a case tried sithout a jury, the limiting of the court upon the contents or anything of the court upon

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ing court may may that they are the result of passion, orejulies or mistake. Attent treet tarehouse Do. v. It. Louis. Alten a Terre thanks mailroad Do., 150 Ill. App. 405. Defendant insists that the judgment is against the manifest saight of the evidence. In order to pass on this point, we have marefully read the testimony as it appears in the transcript.

Plaintiff is a licensed real estate broker in Chicago. Defendant is the amager of the real estate department of the Chicago Division of the locony Vacuum Cil Company, with an office at 59 East Van suren Street, Uhlcago. Defendant and his brother, William U. Yerr, a Ubicago lamyer, coned a 50 foot lot at Harley Avenue and Altgeld Street, Chicago, on which there was a temporary structure occupied by a real estate broker. The title and in the neme of defendant. Plaintiff testified that in the early part of may, 1939, he called on defendant; that he told defendant that he (plaintiff) might be able to find a purchaser for the property; that defendant told him the property was for sale and that the price -as 15,000; that he called on defendant at his office three or four days later and told his (defendant) that he had a buyer who had looked at the property and was willing to make an offer of 10,500; that defendant stated that he would wait until somebody offered him 15,000; that about a seek thereafter mitness saw defendant again and stated that his prospect owned a 50 foot piece of real estate on selmont wenue and was willing to convey this wiece of real estate to defendant and may 19,000 in addition; that defendant stated he would give the proposition consideration and asked witness to return the following week; that the following week witness returned, at which time defendant informed him that he had looked at the Belmont Avenue property and investigated the value, and that such property was worth about (3,000, which, added to the 13,000, would make the offer for his (defendant's) property 11,000; that defendant told witness he

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Seferal no the manger of the relation as a training of the Chicago Asiaton di the Jesony Venue il mesary, site a softion and been sin in in in the common of an interest and and the common of th apirty of the foot and a common telegraphy of the fact of matting Avenue and A. t. t. il its as follow as on roles to re- me a transport objective english by a veri a late trained . Let title on a visit the nego of defeath with the billies of the east page of of rang darraged that of their increasion to bolleo on 1988 ; yes (plaintiff) signs is all a more a full of side of dayle (litalish) and to the large date of the property of the description of the contracted and to partit orithe sid to to include on the of (CO), i. acc four days I but was told bis (decimate) wis tot her nut I syst much 1001. In the netto me same of paidle new turn virginity all as lexical base mid hereste abedrage little sime blues on their beste suchabled deals sings tachestab are anostly relieved are a finds took (000,817 and stated that his prospect named a to foot piece of real estate on of aleber less to cooks with yourse of galille as bee sunsys thouse defendent and pay ha,000 in addition; that defendent street he newla and mentar as counting taken the matterphismens unfilmments and swip foliar to the the following reck witness returned, at which werers Jesupel and To Salvad had all finis and Immedial Equipping made security and Large March Lie walling and that some new property one worth the rather and select for the physics, reads not not been proper yours. and sometime dated resident the hold (Dichtle Official), the manufacture (as inclusional) and

was going to soit until he get a \$15,000 offer; that four or five days later witness again talked to derivate at the latter's office and told him that the prospective buyer with show he had been nerotiating as no longer interested, but that he, (witness) had met a broker by the name of Jaroy Mirsch, with whom he discussed the property, and that Hirech might be interested in purchasing for 15.000; that he was sorking in cooperation with Mirsch to get the purchaser to come up to his spice; that defendant stated he would not back down on an offer of 15,700; that on June 37, 1935, Leroy Hirsch, a broker, and witness called on defendant at the latter's effice and witness introduced direch as a cooperating broker; that hirsen toli defeniant that the buyer he had was sorking on the deal, and that he was, he thought, very close to a deal; that should a deal be made he wanted to know when possession could be delivered; that defendant immediately telephoned his brother, william D. Kerr, and stated that his brother had advised him that it was necessary to give the occupant of the real estate office on the premises 30 days notice to vacate; that kirsch asked whether his purchaser could take the property subject to taxes; that claintiff stated to Hirson that he believed that any savings to be effected should scorue to defendent; that Mirsch then stated to defendent that he wented as urance that defendent would sell for 15,000 "when our buyer is ready"; that defendant said, "Mr. Uphan [plaintiff] has had an exclusive on this property and I will be glad to extend it and give you plenty of time"; that defendent stated that he was going on his vacation and that "if we were ready while he was away on his vacation to close the deal, we should contact his brother, who is and was an attorney, who would handle the details of the deal anyway even if he [defendant] were in town; that before witness and largy Hirsch left, witness stated that he wanted it understood that if he was successful in producing a purchaser he would receive the regular Real Estate Board rate of commission; that defendant inquired that

nvir in the this is at the to the filler. A dry and didner disc of gains when reifle at eas I add to to broth to decide the greater rates of the manifed as made with ground evicements wit a mit mid blad base bud (security) and the due it is read to any and on any paid ideason transport on make Atta extension corner to mean and yet restored as demthe eventry and that direct sight or interreted is perchasing to; of amenic alia mais two oon at guidron was an sant (GCC) to to the purchaser to see as to als vite; to a larger to burned by all and the term of the term of the term of the term of the largy directly a broker, and without or led on defending to the ntireriaco e es do ri. comercial consin ima maite e matsel broker; that Hirson told art sucher that the major he had eas warling on the deal, and that he can, he then the resp class to a deal this so lives relievence made noted to been some allow a bloads delivered; the trade of the cold to a cold the cold the cold to the cold the cold the cold to the cold villion D. Norte and others the blackers is a surpred in the as taitle easter fact that commune and oving at green able out if the president and days notice to uscete; the c drach acted epites his Printile test teams of tealing transmit and the remaining reford to History the fear heart and the to be effected tidi inclusion at herede medi desail sudi turbuntah at surven bluede he wanted wantened tire transfert contract of Lies of the contract out buyer is ready"; that defendent cald, 'ur, timen [plaintfff has had has at basen as help and I will and I read to exceed to and give you planty of time's thet defendent exched that he was gring on his vection and that "if we were made while he are sery on his al ode andiere ste deal, we should contest bis broken at antimore and see an attorney, who would bounds the details of the door anyong even if he [defendant] ners in town; that before withcos and largy od li brit kootevohuu to beture od tadt betate connthe attel durail values and extense of our department of following and following one twin-festival probable told profesions to the free deep tions.

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the commission would be, and that mitness told him 5: that defendant then stated that he wanted it understood he would not be in ble for two commissions, one to Lerpy Nirach and one to witness; that witness then told defend at that he need not surry about that, and that he need only look to witness in the payment of commission; that about three weeks after June 27, 1939, Leroy Wirsch told sitness that his buyer was just about ready to slan a contract and that sithese telephoned defendant's office and as told by his secretary that defendant was on his vacation; that the secretary suggested that he telephone to dilliam Kerr; that witness telephoned dilliam Kerr, who at ted that he knew the witness and knew of the pending negotiations: that situese told Werr that "it looked like within the next two or three days we will be ready to sign a contract and close the deal"; that Kerr stated "when you are ready, if you will 'phone me I will be glad to meet with you"; that three days thereafter witness stated that he was ready to have a meeting in order to discuss the mechanics of closing the deal; that an appointment was made for the following afternoon at a o'clock, which appointment was kept by Leroy Rirsch and witness with illiam Kerr at the latter's office; that "we told him that while we did not have a check in our pockets at the time, that so felt quite certain that in the next day or so se would be ready to tender him a signed contract"; that Kerr stated "that was all right, he was ready whenever we wre"; that they discussed whether to draft a regular real estate contract or an escrow agreement; that william Herr stated that was immaterial, that considerable title work had to be done, and that "if I see that you really mean business and you have 1,000 to put up. I will proceed with the title work, and by that time my brother will be back from his vacation"; that in fact after having received the telephone call from witness the day before, he had wired his brother and located him in Jelifornia and found that his brother would be back the early part of the following week; that defendant ismuel Kerr not back

Buddelle for jor til his sempe per in 16 hoe mileties and ral allock of tan blue of Leinrikou it naire, at terms before two cognissions, one to liver Mirrels and are to singust that situates then told defending that he need took yearly remark the med their his need only look to extended as the expense of months and the k about they seeks with Jun Jr. Littl, Loyar Chrost, paid with sales week populi d di Lan Sentingo e agio si vista duvia insi sea wayud aid dent greissons our of hist a. has veille eithe metar benodgelot deal here there are termed and deal moldener old no are duringted AND RESIDENT AND RESIDENCE AND RESIDENCE AND ADDRESS OF THE PROPERTY AND ADDRESS OF THE PARTY ADDRESS OF THE PARTY AND ADDRESS OF THE PARTY AND ADDRESS OF THE PARTY AND AD welfares pailmen, out to went has recently and what ad food hatele ode Armer with middles with homers \$25 April 1980, black remitter \$168 partitle sit seels her touring a main of years of life or each sould to ort doel"; that Rose shated "sheen you are really if you till 'phone se seastly restricted to the party of the transfer of the season of the I and upwall at using all prisses a over at those are ad test butche est also are transmiss to rest them and princip to entropies the following afternuon at a size and a sentent galaction and Lordy Hirsch and witness willis this asserts but downth your that "we told his that while se did not have a cheek in our sading st the time, that we folk mutte certain that is the pert day up up larate tres sads generative length a will relieve ut there of bluow or year that the team as remember these are set that the see tente discussed whether to draft a require restance and red whether or ag And a Labrational has findly Amballs from modelling and arthur surprise considerable title work had to be done, and that "if I see that you really mean business and you have I. 220 to gut up. I all proceed mort word ad this restord we can't take to have althe est doing his vections; that in feat after having received the telephone cell from elteress the day before, he had vired his brother and lacated his in California and Spand that his boulder small be been the easily . Head for that issued fundamint fedd plant infractal and he from

from his vacation on Monday, August 7, 1930; that witness telephoned him and told him that "we were roady to close the deal"; that he was very busy that day and suggested that witness call the following day; that the following day, fusaday, August 8, 1939, witness telephoned defendant, who stated that he wasn't sure shether or not be was going through with the dowl; that witness weked him, " hy not", and defendent anid he understood there was a Kroger lease a de on the property, and that if that was a fact he did not the whether he was going to make the deal; that witness suggested that they have lunch the next day, and that the parties had lunch the next day, which was educaday, August 3, 1.53; that witness told defendant that there was a aroger losse signed, calling for a building to be erected on the property and the payment of a rental of 350 per month; that sitness told him that "my buyer was ready, willing and able to consumnate the deal in accordance with our agreement and to pay cash for the property in the sum of 15.0000; that defendant said he did not know whether he would sell, that he wanted to give it some thought and suggested that if he did not call the witness between then [ednesday] and the following onday, that witness should call him; that on the following Monday, August 14, 1939, he telephoned defendent and that the latter told him he was definitely not going to sell for [18,000; that on August 17, 1939, LeRoy Hirsch, Charles Mirsch and witness called on defendant and tendered a real estate contract signed by Charles Hirsch, colling for the purchase of the property for the sum of 115,000; that he tendered 11,000 in cash as a down payment until the title could be examined and the deed passed; that defendant declined to receive the deposit or the contract and stated, "I have told you I was not interested in selling for "15,000." Lercy Mirsch, called by plaintiff, testified that he was a real estate broker, and, in substance, correborated plaintiff's testimony. He further testified that he told defendant "the plans and that will take time, will you give us, or will you

from his vacetion on tenerg, sugar V, littly that mitness telephones an real tile that the term of your error and rade hid blot has mid can very may that day and suggested that witness call the failoring day; that the failering day, thening, ou ust 8, 1878, witness taleof dan to maddete ones of service being because and abstancial hamost res gaing through with the first withere ested have "the note no also trant report a concerns the safether at him drahmatch has the property, and the t is t as the til not kno attempt and he were redain to make the deal; the cleared me gented they have lanch the next day, and that the critics but lanch the next day, inclusion has constituted; the Last temper spanned new solden ed of gribling a tot grilles thought seem taget a to state that gen (1981 to letner a to shenyed out has atnounced but no payour mouth; the situes teld him that "my beyon we westy, willing and has property and dele constraint at Lock tell atom person of olde to pay onch for the property in the sun of [15,000; that defendent ovin of between as fedt film biren od redrude mout for bib od bise the some thought and auggested that if he did not only the witness between them [tednosisy] and the relieutes ander, that attness ement outh him; the tollaring Monday, sugar 14, 1889, he allegations are not and also town to the first and are the beautiful and not going to sell for als, 000; the on human 17, 1933, temp hereines has anchucich no believ usaste bar dosvil telivily, dosvil a real estate contract algoed by therein, saling for the purphuse of the property for the sum of 115,000; that he tendered project of time with any little treated much a se deep at 1000,400 time does process the defendant declined to receip the deposit bureaustical the use I may high and I' chatete him stordmen and he th setting for (Lagoco. Letoy nirsen, sailed by misinfiff, restarted successful last back of the bestiful towards to told defendant way life to , so with you will you will you dive me, or will you

can work out the balance of this deal"; that he (defendant) said Mr. Uphas held an exclusive for some time past and that he would give him time to work on it; that witness said, "I'm not interested in any exclusive, I just sant your word, and if you will shake hands with Mr. Uphas that you will deliver for \$15,000, that is all I want, and Mr. Uphas asked him about the commission"; that witness and plaintiff both assured him there would be only one commission.

Charles C. Mirsch, called by plaintiff, testified that he was an attorney and a brother of LeMoy Mirsch, the cooperating broker. His testimony tended to correborate the testimony of plaintiff and LeMoy Mirsch as to the conversation and occurrence at the time the contract and check ere rejected on August 16, 1959. Itness also testified to facts showing that he was ready, willing and able to consummate the deal for the sum of \$15,000.

In behalf of defendant, Fred Breitling, a real astate broker in Chicago, testified that he knew plaintiff and defendant; that in the latter part of July, 1939, he had a conversation with plaintiff concerning the deal; that plaintiff then told witness that "they were getting pretty close to a deal"; that witness said he understood "your exclusive expired", and that plaintiff enswered. "Yes, but that didn't concern him, he was proceeding with his negotistions nevertheless." william D. Kerr, testifying for defendant, stated that he talked to plaintiff about the deal on Monday, July 34, 1939, on which day plaintiff called witness on the telephone and stated that he had called defendant, whose office had referred witness to him; that plaintiff said to witness, "I have an exclusive on the property at Marlem and Altgeld Avenues; that witness interrupted plaintiff and told him that his understanding was that any "exclusive option or commitment you may have had on that property has expired"; that plaintiff stated, "That's true, but nevertheless I am working on a deal on the lot"; that witness then stated that with that undernearly out the neighbor of this for la, brits a removement time of a own cost out to the melegal of the first that he (.etemont) cold la. Uphen hed as exclusive for some the mest one that he rough five him time he cold for some the mitter of the military of the method of the sample of the him time of the mitter of the sample of the samp

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In benefit of derending, and areithing o real eaten inchasion for this init was the real and and beilines appoint at readed that in the latter part of only, limb, to be a conversation of the self countr thus sent Thinniels and them and gainsones thinklely they were gently state to a deal plant address over they aberrace Whitelete and in a principle evication among bootstoken were ald date pairseners are not water assessor that being and any distributed with helpfulness green of southing "constitutions would be and wint amount in last our runds littainly of healest on tour betate 1932, on which day plaintiff called although on the belephone and stoted that he had called dedendart, whose office had referred situeor to him; that plaintiff and to airmen, "I have an exclusive on the herenters at Morles and thouse Avenuer; that present a granded prioriers and told his that his understanding one that any boolers solden or commitment you may have had on that property has craired; intitro as I acaladreves but aura aladi" Trito on ... in the witness when atends that with thet under-

standing he would tak to plaintiff; that plaintiff them told witness that he was coming on a deal that he housed to bring to a head the latter part of the most and that he mantal to get in touch with defendent; that situese told him defendent was on the Jacific Coast; that he, witness, informed defendant that plaintiff had something in prospect and would ascert in where defendant could be reached the latter part of the cook; that on Monday, July 31, 1935, plaintiff came to witness's office, accommand by Leroy Hirsch, who was introduced to witness: that Mirsch or claimtiff stated that they were working on a deal for the purchase of the property and expected to have a contract signed the following day: that they were concerned about the possession and saked if a cancellation notice could be sent to the tenant; that witness said he would not feel justified in Issuing a cancellation notice until he knew there was a contract that was satisfactory to defendant: that witness had succeeded in contacting his brother, the defendant, and was informed that he was leaving Los ingeles for Unicago that day; that direch stated that he had talked with defendant to the effect that the purchase price of 15,000 would be said 50, in cash and 50 secured by a relatively short term mortgage; that defendant had told Hirach that he thought the arrangement could be worked out; that witness replied that there were a number of questions regarding the time factor in the contract: that he, witness, did not believe anything could be accumplished by discussing details of terms until there was an agreement, and that he, witness, was not authorized to approve anything, that he was not disposed to say anything until defendant's return; that plaintiff and Hirson asked him whether there should be a contract or escrepagreement; that he, witness, stated that he had not thought particularly about that, but that "if there is a meeting of the minds, or an agreement and a purchaser has put up a thousand dollars or thereabouts, the rest will be a matter of detail"; that plaintiff or Hirsch said th t Hirsch's brother, a lawyer, was preparing a contract;

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assenting that ment Children's least (Children's at Mind allow all patients tall a tot any quest at hereal as well to but an emilion and of tells with don't it so, at there and that into inc. and to then worth. (fore: all large as in the a factor of the bill below a course dead (fundamental) resident to a different and forms are here. The absence is a constitution of straight i desert of himse to hapter these bi presentions are sergeous at The Laboration is in the contract of the contract of the contract of ema see planth garni ye been nesse tener dinert, she me with most contract thinking to distinct that presents of booksamily ad heren as her after our wir to seed army out ton I will see making Lance of the contract of the following of the contract of the the filest action relatively to a fill book includes on the special Infilited from them all the countries for the countries of the destinate and at 40 mags on litture to liter nodes liberon a paintel al ni behaseour i a ursait i di pambandah ai yestambairan san dadi contenting his bretain is the decement, and the brand ald gottontoco ad a sit hathre doesn't a sit place to be also the character for he soir, sames wit take desits as of samenion the bodies and girrathics and become and has done at its thing of bloom one all Private of tell thereit blad has ladim tob fedt (Docyfron prof fioda erest fact believe smeath a st time heaven ed live succeptance est there and all the court and and the first track to the track and the contract of tel bedrice soor as mice guidings availed out his security on their I di ina juonata me ere timi tidui amen to allera guinavoil he, ritheen, was not authorized to approve engthing, to t be was not Hills Late field present a transported little gridger tot of bloodylle and Hirsch wined him whether there simuld in a contract or escrep--wolfrag throat for that as that there a quentle , as that increase larly about that, but that "if there is a meeting of the minds; or e greenent and a packer bee put up a thousand dollars or themthereta, the rest extra - a carter of breaking that productly ar-Therefore a betterning and Arbeides or Section 2 and part to the state of the state of

that they (plaintiff and Lelloy Hirsch) expected the contract would be completed and signed the following day; that witness stated that he expected to be in his office all the following day and that if they wanted to talk to him they could do so; that he had a conversation with plaintiff on Friday, amount 4, 1939, at which time plaintiff telephoned witness that Charles I. Mirsch, the lawyer, had been ill and that the contract had not been signed on August 1, 1930; that there had been some other delays, and that witness stated that his understanding was that his brother, defendant, would be book the end of that week and would be in his office the following Honday. Defendant testified in his own behalf and stated that plaintiff first contacted him on March 18, 1939; that plaintiff submitted various affers for the property, which were rejected; that on June 27. 1939, plaintiff and Lelloy Hirach came to his office; th t Hirach asked witness what he was asking for the property and witness stated 15,000; that witness also stated he would may a counission; that at that time witness did not know whether Hirsch was an investor, a manager of a contractor or real estate broker; that he was then asked whether he would be willing to take one half cash; th t witness said, "this will all be over within minety days, all be built probably, and it looks to me like it might be workable"; that witness called his brother, a lawyer, the stated "it might be workable. that Birsch stated "we will have to have some time to work this out"; that he inquired how much time was wanted and stated that he had a lot of brokers working on the property and that he had submitted it to people; that he told about offers that had been made; that plaintiff and Mirsch answered that they wanted ten days or two weeks, and that witness replied he would give them two weeks; that witness left Chicago on his vacation on July 14, 1839, and returned on Monday, fuguet 7, 1939; that plaintiff telephoned him that morning and said the would like to get together with me to talk

time passing on burneys impuly point her Milliant quart and tends feature with retaining that a parties that believes better the barriers and the first term to the collection for the active single or of because ad they ented to telk to him they could to set then in hid a nonrecention things of the printing of the party of the series of the series televisioned without the Cherison . Virgon, the impart had come in tons to the deal of the bearing of the total of the the total there had been such while Mileya, and have winted that beat had under a ball of figure for control of the ball of the sould be been the and of their state and small be in all at the following work to Thistuicis four hearts has himed more als at boltfield Juntacial Partition supposed the street in, 1995; met. clasself continue vertices offers for the emotority enter ever rejected; tore on June 1930, pinishiff and Later Deep come to his effice; to t : iroh pateto acentir but transport ada qui priden a m en sair sempio badas dell insis-longe a yea bluer as catala onle scentile feld (000,11) o grade with me are destill radiation send than his anadde and tadt to mentage or a contractor or real escape training that he was then spendir s of there was nice of antilly of allow an endesde bales Albert At 120 augus where wildly were at 120 Elle Eller Adde neglectly, and in limits in an light by mind by marrially line , willinger, Leigiarur ne ingin 71° memor en. 1200-er e zronogra den gobert enmokr those wist Maow at this ame aved as aved like and becase downly buds that he insuled now much time a sented and sectors on take laddladue had ad their ine propose wir no paidrow assert to to nest; then need had beind anothe fouch blos ad feat jalques of fi chitiff and divers unavered the they wanted ten days or the wells, and that advance regiled he would give ther two weeks that witness left Object on his vecation on daily le, 1988, and returned THE REAL PROPERTY AND PERSONS ASSESSED AND PERSONS ASSESSED AND PERSONS ASSESSED. wing and soid the could like to get tagether with me to talk

about this proposed wals, and I supposed it was hat wr. Wiresh had been in to see he about and there had been a tentative appointment made to go to my brother's office the next day at 10:30 in the morning to discuss the terms"; that sitness replied that he had talked to his brother the day cefore and that his brother had not mentioned anything about a tentative appointment, that he just got back to work and that he had other inquiries on the property; that plaintiff said he would like to get the matter settled; that witness informed elaintiff that "your two weeks were up before I went on my vacation and I didn't know what you were doing until I heard from my brother. He wired me a night letter and told me what was going on, and I said there will be no appointment tomorrow morning". witness further testified that he told plaintiff that he went home the night before and took papers with him and made several pages of pencil calculations, and that he was trying to figure out whether he would be better off to sell the property for each at 15,000, or to build on a greger lease at | 380 a month, or to build a much more expensive type of building for a large concern comparable to Wroger; that plaintiff said he would come out to witness's house that night; that witness replied that he did not see what good that would do. and that plaintiff then proposed having lunch the following day, ednesday, August 9, 1339; that they had lunch on that day, and that witness stated he did not like the fact that plaintiff had concealed from him that there was a 350 lease from Kroger; that finally plaintiff wanted to know what defendant was going to do; that defendant said he would not sell for '15,000; that witness said, "I will tell you this, as soon as I know what I am going to do about this property, I will let you know the first thing, along with other brokers who are working on this deal"; that by August 15, 1939, witness "had so many inquiries about this thing, I said to my brother, a a a we've got to make up our minds what we are going to do here and do something, because I am pestered with this thing"; that on august 16, 1839, he

but formit are deducted it to margine i him a new becompare mind fuedo spractized a switting a good bad arent like those he see of al and and al (Tin) or we done the orition of touthers we at an an an about mounting to discuss the terms of their mitares regulard that no tel telled to his brother the dry believe but her bushing his hoster mentioned emphishe about a tentential applications, for in part date tails trivered mir as entriend that had ad told has due of heed plaintiff eald be would like to get the makes overled; that tirness informed plaintiff the "your two weeks ners up being I were on my word stand I like spick were may dade wend diable I has nothered paint are tast to that the trittle blair of the resident to on a sold there will be an equation at the enough him I has an tone and this lighted and that an area believed redtur seemin atter lerived come has gid driv erouse shoot has evaled dayle out redicals one sought of gainet say of told has assolded no lience to To account be because of the contract for cottes of the cottes of the conseem some a blind of we adduce a 1981 to easel report a see blind of revision byttle a new probability by both symmetry identation and the rest of the two blood of pro Lithinia at that witness regiled that he hid not see that past that and da, and that plaintiff than increased having lunes the following day, reduceday, August 3, 1239; that they had lunch on the thing, and that althous most believen to be the thet their plaints of he beter Thuished; which tend is goth work mand (198) a and wood doub and mid him income the total for us galor are sandarian daily mand of bedress no would not sail for the countries out to the said, of will tell you this, as soon as I know what I see joing to do shout this property, I will lot you know the first thing, slow with other inchers who as held measter , time , all designs we shall give a dat no markey sea thrulties about this thing, I said to sy brother, ' " woter agaidfonne en has ared ok or gaing ore on fode abule zun au oder of tog and the state thing"; that on suggest 16, 1929, he

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succeeded in getting plaintiff on the telephone; that he then told plaintiff that he and his brother had decided to sall for "I:, """, and that he had already refused an offer of "17,50" for the property."

There is no dispute that plaintiff was authorized by defendant to well the real estate for the mum of 15,000 and that defendant arred to may praintiff a broker's consistion of 5., or 750. According to plaintiff's version, on June 97, 1910, defendant said he would live plaintiff a reasonable time. Defendant, however, meintaine that LeRoy Wirsch, in the presence of plaintiff, asked defendant to be allowed ten days or two weeks within which to procure a purchaser, and that defendent acceded by granting two warks. Defendant declares that this period expired on July 11, 1339. It is conceded that a purchaser was not produced by that date. Plaintiff and Hirsch next spoke to milliam D. Kerr, an attorney and a brother of defendant, there is a sharp conflict between the testimony of plaintiff and dirach and that of milliam D. Kerr as to material parts of this convergation. Hr. Kerr did communicate with his brother who was on the Facific coast, and apparently informed him of the visit and proposal of plaintiff and Wirsch. Plaintiff, (according to the testimony introduced in his behalf) telephoned defendant on August 7, 1939, the day defendant returned from his vection, and told defendant that he and his people were ready to close the deal. Also, according to plaintiff's contention defendant told plaintiff on August 7, 1939, that he was very busy and that plaintiff should call him the next day. Plaintiff slao maintains that he called defendent the next day and was informed that defendant had not determined whether or not to go through with the deal. Plaintiff further maintains that at their luncheon engagement the following day the deal was thoroughly discussed and defendant stated he did not know whether or not he would sell, that he wanted to give it further thought, and asked plaintiff to call him the following wonday, if plaintiff did not hear from him previous to that time, and that when

encomment in potting plaintiff on ter relevant; that he then inliplaintiff that he and his brother had decided as reli var """, """, and that he had already refuned an effect of ""1", 500 for the recorrige"

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Jadr Ams 600, df To may war to trades leet our flow of rembertab to . I to not clear a 'rejute o Triffice, you of heart Justing ak According to eletters after a till and an inches estd be would give pisintiff a recommonia time. Asfemisch, busway, - Lai i a that Lodey Hirson, in the presence of pinistiff, payed defendent to be allowed ben days or two events which to creame a parobacer, and that defendent consist by continue the series of the life year to be be the manufacture and so the look of the l and Mirach most spoke to dilide at former and a brother te defendant, there is a sharp conflict become the testing to Lebrates of as real of callely to find but destin but Tribulate parts of this convergation. Ar. herr tid com uniceds this his training and to whe territor our and americally information than the table visit and proposal of plaintiff and birth. Cantiff, (conting an inchestab hacodcajer [finance ha of benefered qualitated and wi become to little the log derivation required from the condition, and .Lost add acolo at theor are alread aid and and tarbantab blod Withing bist tamentan noisestnoo attituining of pullrooms andion burnet 7, 1937, that he was very basy and that glaintiff should belies ad a di seletair ople Trisalely . wen from and mid iles defendent the ment day and personal tast defendent had not necessarily determined whether or not to go through with the deal. Fishell? yel pairelies one success as account right to sent entrine restrict the deal sea thoroughly discussed and defendant to the did not less than know vanisher or not he would believe hit fout he would be give it Portion to gricus privately oil and the out threshop before her arrowally, of node tid har and trut of accivery ald nort used for hib littled plaintiff called defendant the following monday, descharat stated he had decided not to call for 15,000. The testiony of defendant as to the conversation after defendant's return from his vecation, is at verience with the testimony of slaintiff. He did may, however. that on Tuesday he took various documents home with him in order to calculate as to whether to make the deal. Defendant scintains that the case and tried and presented to the court on the theory that plaintiff relied on the tender of the sarnest money and the contract on August 17, 1939, for proof of having procured a purchasar. . . have examined the cleadings and the testimony, and do not agree with this contention. Both parties agree that the principal cannot revoke the agency after the broker has propured a purchaser able, ready and willing to buy. (Purgett v. | einrank, 319 Ill. hop. 18.) There an owner of real estate employs a broker to sell it for him. there is a promise on the part of the owner to may the broker for his services whenever the broker produces a prospective purchaser ready, willing and able to buy. hen the broker has furnished a prospective buyer who is ready, willing and able to buy on the terms and conditions proposed, the contract is executed as far as the broker is concerned. (Clatt & Frice v. Admes, Mid Ill. App. 331). From these authorities it will be seen that if plaintiff procured a curchaser who was ready, willing and able to buy on the terms stated, he serned his commission. e are of the opinion that there is ample evidence in the record to warrant the finding of the court that in the fore part of August, 1939, the plaintiff procured a purchaser who was ready, willing and able to buy for the sum of 415,000 in cash, which was the purchase price desended by defendant. It is true that at the time the formal written contract and the 1,000 deposit were tendered to plaintiff, the right of plaintiff to act as a broker in the sale of the property had been terminated. However, there is competent testimony that plaintiff procured a purchaser who was ready, willing and able to buy on the terms stated, orior to the

hearte our march getting privation wit du tablet Amilian Wilte the to remainst aid. All the fill the set fan Indiana fun an as to the conversation live actuals return from his version, a de vertande eleb vie rectioney el iniciat. '. ili ... recent that on Tuesday he then where dreaments hore with his ty coder to destrantament and and the state of the state this troudy and an event of believe are two lairs are made out described and the rest to restrict and the entered and the relation of the descriptions on suppet IV, 1970, for man; of borig: or organist supper on. although and all all the graph and the application and boulers award this somiontion. Both parti-caracters wind a consider and of any value terminate a heave-sen and reduced and resta grangs and and willing to buy. (courts v. ciercia lia lik. a.co. (1.) mrd to it ilse or received a cycle a balas lest la recon a seedi there is a monies on the park of the erner to pry the eroken tur to represent a beautiery datient had between analyting and prospective huyer who is ready, whiling and white to key on the torne all ea tal as has erects at territor all the erect and illies ben bedien by constraint the contract to the state of the sta From these sufficients is all he some that if electricities arounded a purchaser the wes ready, willing and able to buy on the terms stated, ofm: at grade that maining out to ere or . moluelauwe ald bontes ad evidence in the record to werent the flading of the court that in treatment of Assessment Children's tile (Calability property to restrict the the over ready, silling out oble to buy for the one of tis, one in ment of all articles of hebrins asing medium and not make a second of the last the the time the formal entire contract and the light of rowers tendered to me since the plantage of boundary sport in the cele of the preparty had been termineted. However, there is nor who toendorum a horyooth thibalely soul growlines incloqued

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the action of defendant in terminating the access. It is plain that
the action of plaintiff in tendering a contract and a deposit, was
done only as a step in contemplation of an expected law suit, and
did not add or detract from his right to a commission. The trial
court beard the sitnesses and had an opportunity to observe them.

Ifter a correful consideration of the evidence submitted, we are
of the opinion that the findings of the trial judge are not a limit
the manifest weight of the evidence.

Defendant further maintains that if the relationship
of principal and agent was not other ise terminated before against 17,
1339, plaintiff forfeited all right to a commission by eithholding
from the defendant knowledge of the increase in the amount of the
Kroger rent. This point was not put in issue in the trial. It is
not mentioned in defendant's affidavit of defense. Nevertheless,
we are of the opinion that the record does not show that plaintiff
failed to keep defendant informed as to the terms of the proposed
deal, or that plaintiff was dereliet in his duty as a broker.

For the reasons stated, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

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Court of Chicago is afficerd.

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THERE, F.A. 1800 WELLS E. ST. LIVER, D. SONODO.

Annual Jacob et Al.

On Appeal of Abnalls Jacob.

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MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

07 T.A. 245

On July 1, 1925, Abraham Jacobs, Shalem Jacobs, Sampson Jacobs and flir Jacobs, bein Interted in the sug of g.coo. executed and delivered their promissory note for and aut. due b years after date, with interest at the rate of 8 per same until maturity, and at the rate of 71 per annum after seturity, and on the same date, to meare the sayment of the note, they executed. scknowledged and delivered a trust deed on the real satete known as 8140 North Kenneth Lvenue, Miles Centar, Cook County, Illinois. which premises ere improved by a two story and becamt brick flat building. On April 38, 1034, Milliam L. O'Connell, as scriver of the lincoln Trust a davings and, filed a complaint in oh neary in the Circuit Court of Cook County for the curpose of foreclosing the lien of the trust deed. On August 8, 1974, arank . Welinn, an attorney, filed the general appearance of Abraham Jacobs, thelen Jroobs, ... speen Jacobs and Elie Jacobs and also filed an answer. On Movember 4, 1934, on motion of plaintiff, Frank F. Moeder and appointed receiver of the premises. He duly qualified as such receiver and took possession. A decree of sele as antered. Jurguant to such decree the property was sold by a Master in Chancery on December 13, 1935, to william L. O'Connell, as Receiver of the Lincoln Trust a Davings Lank, the mortgages. On January 8, 1278, a decree was entered confirming the encount consistioner's report of sale and distribution. Thereafter, on April 18, 1936, the court entered an order directing Abraham Jacobs to may the receiver as

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Jacobs and Ellis deacher saint in with in a constant Commission been not expended to the farmerical and farmerical and farmerical itime name to be to be with the terminal act of the area na har .velansa resta . man were V to see a the har .velans and the same drie, to common the suggests of the nois, they caregies, grand arrive jury and are part to the best while has be belowned the till the last the same that the same the same the same that the same the same the same that the same the same that the same g-17 Maind assumed the yould all a get becomen true continue shaids nevi net an allegget a british and lived of the Lincoln Court - covings and, filled court and in on grany aglicated to the gar to the former tend to treat the start and al and or . . from , At. . Juny and . book tours off to noil off nelth: advoct concert to come to be a some the self attracts no decode, Campana decode and Ella decode and size file an ensure, on Total and a control of pinintiff, iron P. goder con southful receiver of the president in July cualified as such receiver and buck passession. A dorrer of sele we entered. Foregrap no wreneft at retail a ve bion are wrenery and berook dome of or 13, 1025, to illim i. C'Concoll, as beeriver of the and I root & Seringe lank, the martgages. On denuery C. 1988, a To danger a transferience felouse out gularitace beredes are as outen atten. Three-realter, on lord 18, 1800, the court directing threshed Joseph to may the measiver as

rent for the use and occupancy of the first apartment, the sum of \$13.00 per month. He continued to reside on the premises and complied with the order to pay 312.00 a south rent. On April 23, 1937, the statutory carlod of rademation having excited, a wester's deed was issued to Charles J. Albers, successor to william b. O'Connell. as receiver of the Lincoln Trust & Savings Bank. On may 18, 1927, the solicitor for disintiff served notice on Frank r. Medium, sociaitor for defendants, that on by 10, 1037, as ould appear before the Chancellor to show the case as selened, and present the first and finel report and account of brank . Hoter, Receiver, and ask that the man be approved and the receiver discharged. On June 4, 1937, Frank F. Coder, Mecciver, filed bie first and final report and account, hich should receipt of 427.00 and disbursements of 475.77, leaving a cash belance to the credit of the egtate of Ml. 33. The receiver also reported to the court that on May 1. 1937, he surrendered the possession of the presides to the grantee of the master's deed. On June 4, 1937, the pourt entered an order approving the report and account, allowing the receiver the belance of M1.23 for his services, and discharging the receiver. On October 10. 1939. Abraham Jacobs filed a verified petition and motion in the nature of a grit of arror cores noble. The petition recited inter alia that during the tenure of said rank !. oeder as receiver, on to-sit: August 18, 1936, in his especity as receiver of said premises did employ one Leo Abrowski to apray and other ise chemically treat said premises for the purpose of exterminating insects and varmin infesting said premises; that during the course of their employment and while chamically treating anid premises, and as a direct and proximate result of the negligance of said bec Karowski and his employee, one Larry Cooper, an explosion occurred and fire resulted which coused your petitioner to become pariously burned, shooked and permanently disabled; " * * that notwithstanding the fact that the hareinabove stated accident to your petitioner

to any see and after our first out he wasperson has not eas and seem ins an inert od? so obier of bromisses at . Green men Co.r.i. complied with the order to tey la. To make the order of the 1837, the sheithout seried of solematon border arches, a deader. deed wer types to the contract of the stant of he willing to the contract of of Commell, as received of the stately land to be desired to Mary: no tribon beries the about not residence out . The L. al year floor to the leading to the leading to the as and the as a life, as a leading to the leading to the state of the leading to th appear before the Chancellar to the turn of the titues, and resemb the first and final start and request of the above actor. -eik treisse sit has teveres at same off I of Muc hos grevised . On Jone . 1977, tennis . 'Levier, ...oci por, faisi mis five man co. Vil to address a space which about the franch Leaff La To diblore and us consider an or a private a TV a TV. Lo state togs where the state of entropy and the states and the states and on day L 1807, he corrested the corrested of the vertice to the graphs of the sector's deed, it is a lear a term to propert the or der approving the relative test and restant allocates are the bulence of will'the terrices, and discherize the resulter, on Mercher 10, 1983, France Access filled a vertiled estition and multile ody . ilses perso users to three to empen sub mi nortem refer . I down fire to evenes seit guirub' teds elle refut baller se receiver, on to-sit: suguet 18, 1930, in his or profity of roughty telegradio but yerom of Manoral gal and yelles his assisted blue to bemiselly treet and trouines for the nor case of extersionals the pull of the property of the pull of the property of the property of the pull of the pu of their engloyment and while assentedly treeting out; greaters, onl him to conmissed and to dience of animony but decile a ac but Karemeki and his samioyer, one tarry Canper, on explosion occurred fire read ' ' ' count joiling away becaus ' ' Lours walk anihartenitivet that " " " theidrait giraneste una hadooke abatten rancising twoy of inchises beings avaientered and

occurred during the tenure of the said stank r. doeder, so receiver. and notwithstanding the fact that the said Irank F. Roeder, receiver, did. with intent to consent from the court the herein described merligent set, froudulently and milfully, mostly fail to account and report said occurrence to this honorable court, and, in pursuance of mid aliful concentrent, did abily full to comunt for the expenditure of somey involved in the employment of the said Leo surpeski in regard to the said extermination sore contracted for, either is the verified report and account or list of youchers; and as a result of such fraudulent concentment the court - 1 toot in ignorance of said accident and as a result of said fraudulent concesions, this court did suprove said report and account and entered an order discharging and renk . . teeder an receiver on June 4, 1937, to the detriment of your setitions; " " that on June 8, 1937, your petitioner did file s complaint to law in the Circuit Court of Cook County entitled Jacobs ve. Roeder, et el. No. 370 7046, setting forth in necessary det all the octs of negligence on the part of said defendant; that on April 30, 1938, an amended complaint was filed in said action; that the said Chase N. Albers, Receiver of the Lincoln Trust & Devines Bank, was dismissed as party defendant on January 31, 1939, and that appearance and assers were filed on behalf of the other defendants in said las wit." The petition proyed that the order of the sourt approving the first and final account of Frank F. Noeder, as receiver, and the order discharging the receiver, be vacated, and that "this o mae be consolidated with the case of Jacobs vs. Aceder, et al., No. 370 7046, and that all issues be tried in this sause as an action in the nature of a bill of equity to adjust the rights of the parties hereto"; that any judgment rendered against grank r. Goder be dade a lien woon the premises, and that a rule be entered against rank . Hosder to show cause why he should not be held in contempt for failure to

and the control of the second and the second and particle and and the second are the region of the section of the and nation and knowledge of real work of the contract of the contract of thought sintiffed for the edition through at amound dole abid more and the constitution of the board of the contract nd the translite out to a construction fire factor for tract of his place of partitions in the To semegered net has an equipment of the contract of the contract as the section and the here the property is the contract and the contract of the increase, of the final me ductor of the decree and first of decree the jon the piper and the fitter of mean next and he disease a me inc and large of the control of the first to be a control of ouncenleant, this count did at the for it of the unit things the a, aprimond a general time him allereduals tonto an horotae the fact " " " restriction that he standards one of that a man June 0, 2007, your motitioner air bis consistent anny , 7000 , 0 must LEST ALLES TO ARREST ANY ASSESSED DESCRIPTION TRANSPORT TO PROOF PERSONS consider to save and ileand general at street and see at 1000000 on the root of sent belordent; the t on april 25, 1975, an amind capill . . and bles od dedt politer bire at belit ere datelemes Localver of the Lincoln From a Lucings only wer displayed of waty defendant on Jonney El, 1989, one thet at entence the unitern ad! ". tipe out his al angelenger reche but to the ded me balit avan patibles grayed this the entire of the entit a praving the first ent Time account of transport of the contract and the care air--doo no score clast day the greaters on gravisors and gaigneds ten with the case of a cobe ver lactur, so ci., is, Syy mag, and the toll leaves be tried in this sepre on an estion in the return the partie of the contract of the selice of the termine of the termine the ter BALL IS NAME OF TAXABLE OF MARKET PRODUCED DESCRIPTION OF PARTY. THE PERSON OF THE PART OF PARTY PARTY IN THE PARTY NAMED IN e cours shy he should not be held in contempt for frillers to

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present a full, true, accurate and complete report and account in his application for discharge as receiver. On October 14, 1033, Charles H. Albers, as neceiver for the Lincoln (Tunt & Davings Lank, filed a critten sotion to strike the petition and sotion of Abraham Jacobs. On Localber 20, 1339, the court entered an order striking from the files the petition and sotion of Abraham Jacobs, to reverse which this appeal is prosecuted.

The first two points urued by potitioner Jacobs are that (1) a motion in the nature of a rit of arror cores nobis say be brought to correct errors of fact committed in a court of record within five years after realition of final judgment. and (2) that failure to give proper notice of proceedings is an error of fact not appearing on the face of the record sufficient to sustain a motion in the neture of a rit of error gores mobis. Plaintiff does not challenge the law as announced in these two points. The third point presented is that "the relationship of attorney and client between Frank F. McUinn and Abraham Jacobs, had terminated on January 8, 1936, so that service of natice upon Irank . . Jouinn on May 18, 1937, was not binding upon Abrahas Jacoba." Under this point petitioner argues that on the entry of the deficiency decree the relationship of attorney and client caused to exist. He also argues that the relationship of attorney and client terminated at the expiration of the period of redemption. It will be observed that the notice of the presentation of the final account and report and served on attorney Frank P. McCinn 25 days after the expiration of the statutory period of redemption. It is difficult to lay down a meneral rule as to when the relationship of attorney and client ceases. Determination of this question depends upon the facts and circumstances of each case. It may be said that the relationship terminates when the object for which the attorney was employed has been accomplished. Petitioner was required to take notice of the law of this state that it is the duty of the receiver to surrender consession at the expirapropert a lowe, two, two, two are consider report as applied to a consumer. (a consumer id, 1864, has applied to a receiver. (a consumer id, 1864, 1864, and the applied to action to a little to action of the filed the petition and count encerts on other carifing from the filed the petition and action of decimal the petition and action of decimal according to accordin

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no year adden nature to tire a to studen and al molden a (1) brown to driver out bestimen took to averte desires of signeria sens (2) the grant find I all to modificat total areas areas with middle don't be now to an all againment to maides Temoto Svin of Svulia seines of and office recor out to such and so guitesous for motion in the nature of a wit of real course of the state of the brint and and desire and would be bon count as well and mysalican ton anolio han gravato la cheminateles vatu fint et bessenu sulos . no betenings had androad mental has multab .. Hard asseted Jamesy 8, 1886, so that service at notice trent ?. Boding on Inter sint tehnu ". adoor6 seniords no a gathered for now ATENI all you with some properties and the state of the best being the section of reletionship of "thorney and elient essend to exist. We also ergoes the the relationship of charmy and elient terminated at the expiredlar of the period of referencing. It will be observed that the haves and the presentation of the finit adopte and to solden and to moderate and rester by the method of Marie Yourosta no statutory pariod of redscriber. It is difficult to ley down a ceneral rule so to shen the relationship of stormy and chient cenera, determination of this sucretion depends upon the facts and circumstances of such appear it may to weld that the relationship terminates then the object for which the etterney was employed mas been accomplished. thigher was ramined to take motion of this new tend that - If I will be with a second of the contract o

tion of the period of redemption. The interest of the defendant in the litig tion continued throughout the redemption period and until the receiver should account. Petitioner was interested in eveing to the would tion of net rents and in slaining any purplus which might remain. As a tenant he was also interested in the termination of his tenancy under the sceiver, which could not continue beyond the period of redemption. It is a setter of common knowledge that the practice in the courts of this caunty sanctions the scrving of notice of the application for the approval of receivers' current and final accounts, on the attorneys of record. The interest of the client in the subject water ices not and eith the entry of the decree or the confirmation of the wals. but it continues until the receiver has been discharged. It is interesting to note also that the retition filed herein done not say that Mr. McGinn, the "ttorney, failed to dvide bim (netitioner) that notice had been served. It is remerkable that although petitioner knew or should have known that under the usual course of practiure the final report and account of the receiver would be presented shortly after March 13, 1937, when the period of redemption would expire, he nevertheless took no action to have the offer (of June 4. 1837), approving the account, set aside until October 10. 1939.

ment of partinent facts by the receiver appointed by the court, in his account and report concerning property entrusted to him, is an error of fact not appearing of record within the amaning of Rec. 7%; that the trial court being a court of equity had the power to wante the order entered in reliance of fraudulent representations of an officer of court, and should have vacated and order and granted the reliaf prayed for". It all be noted that the petition does not directly charge that the receiver locder had notice or knowledge of the accident. The petition does assert that "notwithstanding the fact the hereinabove stated accident to your petitioner accurred

The list of pertinent faces by the receives the freedries court, is neat of pertinent faces by the receiver entruced by the court, is his account and report concerning presently entruced to him, he entrot of fact that and report concerns of realty sad the pertinent of receive to the fact the trial court being a face of face the restressal time of an the order end greated the fact frequency and court have read asid order and greated the relief grayed form. It will be noted the petition does not relief grayed form. It will be noted the petition does not the senident. The petition does not received the resident. The petition does not read that the needs the needs that the needs that the needs that the needs the needs that the needs

during the tenure of the said Frank F. Hoeder, as receiver, and not ithat make the fact that the said rank . weder, receiver, had notice and knowledge of said accident, the said frank I. Hosdor did. with intent to concent frue the court the berein described negligent not. fraudulently and elifully, sholly fail to account and report and accurrence to this honorable quart. This assumts to an inference that the receiver did have notice or incolodie of the accident. The petition, however, is silent as to show ar in what manner the receiver acquired knowledge of the accident, nor is there any allegation in the patition, or elsewhere in the record, that the receiver failed to use due care in the selection of Lea K rowski for the ork of extersion ting versio from the building, or that the latter and his helper were not akilled, experienced and fit persons to perform that particular work. We are of the coinion that the patition does not not forth valid ground for relief under Jection 78 of the Civil Practice Act. For the reasons stated, the order of the Direct Jourt of Dook Dounty entered December To. 1939. is affirmed.

ORDER AFFIRMED.

HEBEL, P.J. CONCURS, and DENIS E. SULLIVAN, J. DIBSENTS.

during the tennes, and the ". ". harr. I is not be considered note it because of the cast that his was the court was the yater . I deve like with entired, the will have been but did nith intent to control front be specificated in the control file tropent total fraction and williams the traction of the fraction administration of the same that the same the same the same the to tally you tally the testines all had september as had the accident. The potation, necess, is silent to be even of in the the done of to a beinger beriann torings our thank lade are a any allegation is the collision, or else here is the reason, and to notioning one of orce out one of half t anviscon and finds to . Riblio sit more ninter mitralrubing to Erec out tot imeroval the letter and his below one not existed, or epigeed and resister and le ter of the religious of it ametres of amorem the green failer wit immer them mann see see week meditor out seds Coubles Va of the Sivil isometer out the team of the shop the ok Transly arrested tempelors is 1979. of the growth file of the file of the file .bentalla d

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HERMAN DROSE OF TAXABLE PROPERTY.

MR. JUSTICE NURKE DELIVERED THE OFFICE OF THE COURT.

On October 7, 1939, plaintiff filed her complaint in the Superior Court of Jook Sounty and therein represented that the parties were married on July 38. 1938, that she conducted har alf as a good and dutiful wife; that on North 3, 1989, without any provocation or justification, defantant abandonel her; that she lived separate and agart from him without any fault on her part; and she proyed for an accounting, for temporary alicany, for an injunction and for experate wintenance. On October 7, 1939, the court granted a temporary injunction. On betober 19. 1931. the court granted a further injunction. These orders were are need without previous notice to the defendent and the giving of a bond was excused. After the issue now of the injunctions, the defendant filed a motion to strike the complaint, vacate the orders for the write of injunction and to dissolve the injunctions. The court did not comply with the request of the defendant for an immediate disposition of the motion and defendant appealed from the interlocutory orders granting the temporary injunctions. Our opinion, reported in Grossman v. Grossman, 304 111. Apr. 507, filed April 10. 1940, agreed with the defendant that plaintiff did not wake a showing sufficient to warrant the chancellor in granting the injunctions without notice, and that she also failed to make " showing sufficient to suthorize the chancellor to excuse the iving of a bond. We decided, however, that the motion did not raise any point that the injunctional orders were improperly issued without notice, nor that the court improperly saived the lving of a bond. no held that the defendant having waived the joints that the injunctions were improperly issued without notice and without cond,

lare of the Main and Markett . On Cotober 7, 1830, 12 intil Filed har nearlying in the Suprior Churt of Cook County and therein or recent to the the

planting particulars are visit , that , we said no individual way and roof es a mood and duilful elfu; that and con , lift, itamet any NEW YORK OF DESTRUCTION OF PERSONS ASSESSED THE TEST THE TRANSPORT then and no limit was toodile ald not? time bus strange havif and she grayed for an association, for beauty allegay, for an injunction and for severate arenesses, on tetolar 2, 1976. . The comment of controlled comment of largery Price and Laborate and allegated the state of the same and same and time of the spirit and less securities of the section amineral standing on burios off , annihwaying of the anniques and tofit . Decime now fall environ to action opening, who is the office for trues and .secitosufui and aviosals of has neitonegal lo stire only did not comply with the record to of the extended for on insection disposition of the metion sad decine at the neithernal locatory erdors greating the test or Ty injunctions. Our country reported in Grossena v. Gressens, 504 III. Apr. 807, files arril 19. a page don bib Yilimirle dail testeriab add die boarge abel ent galiaser of relicences and further at the telling polyods injunctions without nation, and that one wise failed to wike a MAJEZO BAT SHOUTS OF THAT PRANCES BUT PROTESTED OF SUPPLETTION SELECTED of a bond, to decided, bostror, thet the motion of decident Should'be necessi the course were seened Land Principles off both falou shoes o to quivi and bertar placerymi frues out that were aciden and that the defendant herica galved the best of that the Jame Joseffer his suffer front's learni hiverwest free and people could not be heard to object on such vounds. On any 10, 1340, (after our annuate was filed) defendant was rented leave to file an amended motion to vecate the injunctional orders. This accused motion urges, for the first time, the points that the injunctions were improperly issued without notice and that the giving of a bond was improperly excused. On the same day the court entered an order that the amended motion to vacate and set made the injunctional orders, be dississed, and that the relief therein requested be denied, to reverse which this appeal is prosecuted.

This appeal again raises the two points which were urged in the previous appeal and which we decided adversely to the defendant. We then ruled that he waived these points by his failure to raise them in his motion. By the amended motion he does raise the two points. However, it is abvious that having saived the points, he cannot now raise them. Our view is that the previous opinion disposed of the two points that are urged in the instant appeal. Frior to filing her brief, plaintiff filed a motion to dismiss the appeal. One of the grounds asserted therein is that our previous opinion determined that the defendant had saived the questions now presented by this appeal. We took this motion with the case.

Maving read the abstracts and briefs, we are now of the opinion that the motion to dismiss the appeal should be allowed. Because of the views expressed, the appeal is dismissed at defendant's costs.

APPEAL DISMISSED.

HEBEL, P.J. CONGURS, and DENIS E. SULLIVAN, J. DISSENTS. nouted make her heart as a report of area consistent as a synth party (after our residers as filed) dereadent as granted to reside the consistent as a secret for the impulsional secretary as secretary that the filed party and the filed the injustriana sere improvedly imposed either, and the file the filed of a benefit as a filed and the consistent of a secretary areas of the consistent of the consistent as an extendity areas of the consistent as a secretary areas and the file and secretary and the filed of the consistent of the secretary and the filed of the consistent of the secretary and the filed of the consistent of the filed of the consistent of the section.

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HERNING-WALL-EARVIA

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PAUL KORSHAK, LESTER KAUSHAK, DAVID HARRIS, LIPMAN HARSIN, doing business as CHICKOD STATE FARERS, LTD.,

Appellante.

OF SHISAGO.

307 I.A. 2462

AR. JUSTICE VENIS L. SULLIVAN CALLY-NOT THE OFICIAL OF THE SUPAT.

Plaintiff Herring-Hall-Mervin Safe Company, a corporation, brought suit against Paul Korshak, Lester Korshak, David Herris, Lipman Herris, doing business as Chicago State Pawners Ltd., to recover the belance of 1300 which plaintiff alleges is due it on the wreter trice of a set sold and delivered by plaintiff to defend his. A trial as and in the Municipal court which resulted in finding and judgment being entered in favor of leintiff for 200, and casts against the defendants on their counter-sais, rose which finding and judgment defendants bring this appeal.

No question is raised on the pleadings.

The evidence shows that the defendants manted to purchase a new safe and called at the place of business of the plaintiff; that left business control was entered into both on the parties; that to the and a control was entered into both on the parties; that the price of the safe was \$400 and defendants paid \$100 and were allowed small of 100 on an alloafe which they traced in the time of archive which is equivalent to 200, for hich they procedured or dit, and that the telance than recaining as \$100.

The payment of which suit was instituted.

It further appears from the evidence that after the safe res received by defendants they requested that plaintiff take the safe back as it was too heavy for their use; that plaintiff refused to take the safe back as on on one on the continued to use the safe and were still using it up to the time of the trial.

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no question of law is involved in this case, but it is mostly one of fact.

Inequals as defendents bought the gafe, paid part of the purchase price, accepted the safe when delivered and have not returned it to plaintiff and no fraud is alleged or proven, we think the trial court was justified in entering judgment in favor of plaintiff for 1200, with costs against defendants.

For the reasons herein given the judgment of the Municipal Sourt is affirmed.

JUDGENET AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

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ANNA KOVAE.

MODERN MITUAL TUNNUE SCHOOL ANY, a corporation, Apperlant.

CF CHICAGO.

307 I.A. 247

MR. JUSTICE DENIE E. SULLIVAR CELIVERED THE CRIMICA OF THE COURT.

This suit was brought by Anna Kovae on an insurance policy issued by Modern actual Insurance Pospany on the life of Feter Kovae who later died on eptember 27, 1930, in which policy Anna Kovee was named as beneficiary. The policy was for 1,000 and plaintiff alleges that defendant refuses to pay same.

The defense interposed to the suit was that the policy lapsed because of non-payment of premiums and that the policy and not in force at the time of the death of leter house; that all interfer had assigned her interest in the solicy and has no further interest therein; that the policy had been is seed through aisstate ents fraudulently made by the insured in order to obtain said policy, and that the maximum amount to be said on said solicy is for \$330.

Plaintiff filed an affidevit for a success judgment under Nule 111 of the Unvil Practice Act of the Municipal Court.

Interrogatories were filed with plaintiff's claim.

Defendant's answer thereto stated that if there was anything due

it was for only 330, but that they had a defense regarding said

olaim, but it does not state what constituted such defense. The

defense as it appears in the record before us is not sufficient,

and that which does appear consists of mere conclusions.

From a review of the record before us, we think the trial court was justified in finding for the plaintiff in the sum of 370 and costs. Therefore, the judgment of the Municipal Court is hereby affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

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Interrogatories sere files even printiff's cists, the set series was anything the let was for only 330, but that they has a science regarding and claim, but it does not asece what constitutes such follows. The defense as it appears in the recest infect we in not sufficient, and that shick does appears in the recest infect we in not sufficient, and that shick does appears not states of sere conclusions.

DESCRIPTION OF PARTY OF PARTY.

41164

IN THE MATTER OF THE ESTATE OF ELIZABETH PLUMER, DECEASED.

WALTER PLUMER, DECEASED.

CHARLES PLUMER, Appellee.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Walter Plummer, hereinafter referred to as contestant, appeals from an order of the Circuit court admitting to probate a document purporting to be the last will and testament of his mother, Elizabeth Plummer, deceased.

The will was executed June 6, 1939. Elizabeth Plummer, the testatrix, died June 24, 1939, following a severe illness attended by various complications. Dr. Joseph Sodaro of Forest Park, attended her May 21. 1931, and testified that when he was introduced to her she did not respond and was reluctant to talk to him or explain her complaints. Upon examining her, he found a cancer of the uterus and a diseased liver. She was very emaciated and the physician described her as the "thinnest patient I had ever seen," all "skin and bones." Her principal ailment was an acute diabetic condition. The physician suggested insulin treatments and a nurse, and based upon reasonable medical certainty it was his opinion that she would live from one to six weeks. He said that the diabetic condition in which he found Mrs. Plummer would affect the mind and put the patient in a state of coma or near coma, that "as one reaches the state of coma, it affects the mind. They can do things that they don't know they are doing. Their state of mind is cloudy and they cannot think clearly. A person in the condition I found Mrs. Plummer * * * was not in condition to transact business. I saw her the next time June 12, 1939,



MN. PRESIDENG JUSTICE PRIMED DELIVERED FOR CEIXION OF THE COURE.

appeals from an order of the Circuit court schelling to prohebe
a document purporting to be the last will and testament of his

The will was executed June 6, 1939. Elizabeth Flummer, tim sestabile, died June 14, 1930, Principle a severe illienes attended by various complications. Pr. Joseph Sodero of Forest Park, attended her May 21, 1911, and testified that when he was Elet of frateuler and the brogger jon hib ele and of beouterini to him or explain her camplaints. Upon examining her, he found s cancer of the uterus and a diseased liver. She was very the light the physician described her as the "three patients I had ever scon, " all "skin and bones." Her principal allment was an acute diabetic condition. The physician suggested insulin treatments and a murso, and based up a reasonable medical certainty it was ints opinion that she would live from one to six weeks. He said that you disserts condition in align on remod its vices ro amo to estat a mi destine patter in a state of come or near coma, that tas one rectines the state of coma, it affects the mind. They can do things that they don't know they are doing, Their state of mind is cloudy and they cannot think closely. A rerson in the condition I found Mrs. Plummer * * was not in condition to be a sour time. I saw her the next time June 12, 1939,

at her home. They had gotten a nurse. She was propped up in bed. It seemed more difficult for her to breathe. I got no response to my questions in any sensible way. Mer condition was worse. I saw her again on June 15th. Her condition was worse and she was in a semi-comatose condition. From the condition that I found Mrs. Plummer in on May 21, 1939, and on June 12, 1939, she was in no condition to have executed a will on June 6, 1939, and be of sound and disposing mind."

When the will was executed the testatrix had become so ill that because of her diabetic condition she was anable to see. The will was drawn and executed under circumstances described by Sylvia Barker, one of the attesting witnesses, as follows:

"I talked with her (the testatrix) and Charlie (the proponent of the will, who is named as executor therein, one of her sons) the same day. At 2.00 P.M. of the same day. Charlie and I were present when I got in there. Mrs. Plummer was mumbling and mumbling, and talking about money and everything; that Walter, Tess and George (her other children) had money borrowed out, and was saying she asked about the money and everything between the two of them, and then they were talking about money they had, and the different amounts, and then Charlie told his mother * * * to make out a will, and he told her that she was to leave five hundred to Walter and George, and the rest to himself. We stayed there a few minutes and went back to my home. * * * When I got there Charlie said, 'How are you going to write it?' I said 'Charlie, I don't know how she wants one thing.' 'Now', I said, 'your mother ought to get another lawyer,' and he jumped up and he called Siegler (attorney for proponent) and he told Mr. Siegler that the will had to be drawn up right away, that his mother was going to die any minute. He was at my house and I was going to typewrite it. * * * Charlie talked to Mr. Siegler on the phone, and he took notes while talking there, and he told me, 'You want to take down on the typewriter what he had taken from Mr. Siegler on the telephone. I never spoke to Mr. Liegler on the telephone in my life.

Mr. Plummer's house, did you? A. No, I did not. Charlie did. I was with Charlie. We went into the room and she signed it. * * *

"Q. Who asked Mrs. Plummer to sign the will?

"A. Charlie did. As we were going into Mrs. Flummer's house, prior to signing the will, when we got out of the car, Charlie said, 'If Walter is around, just change the subject about the will, because Walter is trying to get a deed from my mother and I got to get her name on the will.' 'She is going to leave \$500 to Walter and George and all the rest to me.' He said 'Why, it would be a crime for her to die without a will.' Charlie put the pen in her hands. At the time Charlie asked her to sign the will, Mrs. Plummer drew back and did not want to sign it and

at her home. They had gotton a rurse. The was proped up in bod. It seemed more difficult for her to breaths. I got no response to my questions in any sensible way. Her condition was worse worse. I saw her again on June loth. Her condition was worse and she was in a semi-sematose condition. From the condition that I found Mrs. Fluemer in on May 21, 1939, and on Jame 12, 1939, she was in no condition to have executed a will on Jame 12, 1939, and be of sound and disposing mind."

When the will was emecuted the testatrix and become so ill that because of her diabetic condition she was unable to see.

The will was drawn and encouted under circumstances described by sylvia Barker, one of the attesting witnesses, as follows:

r sons) the same day. At 2.00 Y.d. or the s.

In the continue of the transfer and deorge, and the rest she was to leave five hundred to halter and deorge, and the rest liow! I said, 'your mother ought to get another lawyer,' and he is not he will had to be drawn up right and in let that the will had to be drawn up right and in the secondary and in the took notes while telking there, and he took notes while telking there, and he took notes while telking there, and he told me, olegier on the telephone in my life.

ter the will was written up, you took it but to the last to the last to the last the

"Q. The saided Mars. Flances to sign the edily

"A. Cherle Mil. As while which will when a cot one of the cary had no char a similar to will, when a cot one of the order of the cary mount is will, because the indicate the mount, just them the indicate the country will, because the country of t

Charlie said, 'On, ma, come on.' Then Mrs. Davies (the nurse, who was another attesting witness) and Charlie propped her up in bed. Charlie put something under the will and held it up, and Relen spelled out the letters. Then when it was over, she said that the 'E' had been left out and the 'T' was not crossed and Helen then put them in there. Charlie and Mrs. Davies held her up from the bed. One was on one side and one on the other. Her condition was dreadful. I thought she would die any minute. She was all emaciated. She was like a bag of bones. There was nothing to her. She did not respond to questions or things that were said. When Charlie said I got the will ready, she drew back and did not want to sign it. Then Charlie said, Oh, ma, and then they pulled her up and Charlie put it under her. * * * When they propped her up and signed the will, I don't think she knew what she was doing. I don't think she realized everything that was going on. I did not have any other conversation with her. She was mixed what was paid up all around and the money she used. And Charlie was prompting her and telling her. I talked very little to Wrs. Plummer. Charlie was in and out prompting her. She said she intended to make me executor, and I said, 'No, I would not do it.' * * * She kept on saying what money she had and what money Walter and Tessie owed. It was unintelligible. I noticed the way she kept mumbling over and over. She certainly was not straight in her mind about it, because she did not know whether they had paid it back or not. She kept mumbling all the time and repeating over and over about her money they had. Walter, George and Tessie.

"The Court: Did Mrs. Plummer ask you to sign the will as a witness? A. No.

"Did she ask Mrs. Davies? A. No.

"I typewrote the will * * * not from my own knowledge, but was given to me by Charlie Plummer."

The other attesting witness, Nelen Davies, was the nurse on duty. The salient portions of her testimony relating to the execution of the will are:

- "Q. Did you believe her to be of sound mind and disposing memory at the time she signed that instrument?
 - "A. She knew she was making a will.
- "Q. Did you believe at the time she put her name down there she was of sound and disposing mind and memory?
- "A. I would not know any other answer but how I expect she knew she was signing the will. She told me it was her will. * * * on the day the will was signed Mrs. Plummer was very sick, she was emaciated, repeatedly sick to her stomach and in a general bad condition.
- Mr. Guerine: Q. What was her mental condition and how did she act?
- "A. She was confused and worried and expressed her worry in words to me. She was afraid somebody was going to steal her money. She said that to me. She was unable to tell the difference between a one dollar bill and a five dollar bill. She would whisper to me and ask me to help her take care of her money. When I went into the room, Charlie would stop

Charlie said, 'Oh, ma, come on.' Then Mrs. Navies (the nurse, the mese, the mese, the retresting mitness) and Charlie propped (ser up in

Helen apelled out the letters. Then when it was over, the said that the 'E' was not crossed and that the 'E' was not crossed and send bled put them in there. Charlife and Mrs. Divice held her up from the bed. One was on one adde and one on the other, her condition was dreadful. I thought she would the any minute. she was all emaciated. She was like o bar of bones. More was were said. Then Charlie said I got the will ready, one drew back and did not want to sign it. Then Charlie said, Oh, us, and hien they pulled her up and Charlie put it ander her. " " " hen mopped her up and the will, I den't think she may vist propped her up and signed the will, I den't think she may vist asw eff. . Total not have any other conversation with her. The was altere mis power was deep detects. Alle age follow wer deale bendly and the case of th the money limited was in our letter but the party of the party of on the carte a and also the terms of the property of the contract of ait booiton I .eldigiilesminu asw II .bewo eigest bue reflect rollege on one that other one, area one were nothing food of a two and year reduction would not be be selected it duods bath would over and over about her money they had. Halter, Peorge and ". ojeso"

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talking. They would not talk in front of me. On the day the will was signed she was confused all the time, every day. She mumbled at times.

"Q. Isn't it a fact Mrs. Davies, that she drew back and acted as if she did not want to sign it? A. I don't know. It could be interpreted that way. She was confused and worried about everything. * * * Charlie put the will underneath her and put the pen in her hand. Bither I or Charlie spelled the letters and told her what to write. I spelled them out, if I remember correctly. After the will was signed, Charlie swore me to secrecy and not to tell anybody. * * * On the day the will was signed, I did not hear her discuss business and carry on a rational conversation. She was in a daze part of the time."

Both Sylvia Barker and Helen Davies had subscribed as attesting witnesses to the will. The attestation clause is in the regular statutory form, and includes the statement that at the time of the execution of the will the witnesses believed the testatrix to be of sound and disposing mind and memory. Upon trial in the Circuit court, however, Miss Barker entirely repudiated her opinion and gave her reasons therefor, as hereinbefore set forth, and Mrs. Davies, while testifying that she believed Mrs. Plummer knew she was executing a will, stated that Mrs. Plummer was seriously ill, hazy and confused, and at best her testimony indicates that she entertained considerable doubt as to the testamentary capacity of the testatrix.

There is substantially no dispute in the evidence. Mrs. Plummer was desperately ill and in the last stages of diabetes, besides other organic complications. Her attending physician was of the opinion, from examinations made shortly before and after the execution of the will, that the diabetic condition in which he found her had affected her mind, that she was in a state of coma, or near coma, that her mind was cloudy and hazy, and that she was not competent to transact business or to execute a will on June 6.

Where the attestation clause of a will is in due form and the will bears the genuine signature of the testatrix and the subscribing witnesses, it is prima facie evidence of the due execution of the will. (Brelie v. Wilke, 373 Ill. 409.) But this prima facie evidence may be overcome by the testimony of witnesses. In this proceeding the attesting witnesses themselves rebutted the

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prima facie case. There was other competent evidence indicating that irs. rlummer was ap roaching a state of coma, that her mind was clouded and hazy and that she had no clear conception of the disposition of her property. The record does not indicate that the will was read to her and it is clear that she did not and could not read it herself. Witnesses for proponent testified generally to the effect that they had known her for many years, had seen her twenty or thirty days before the will was executed, and that she appeared to be of sound mind. But none of these witnesses had seen her at or about June 6, after she had become permanently confined to bed. While it is true that where a witness who has subscribed to a will, stating in the attestation clause all the facts required for a proper attesting of the will, testifies on the hearing to a contrary state of facts, his or her testimony should be closely scrutinized; nevertheless, the evidence in this case relative to the circumstances under which the will was made, and the physical and mental condition of the testatrix, overwhelmingly demonstrates that she was physically and mentally unable to make a will. In fact, it appears from the evidence that the instrument was prepared under the direction of proponent, who was named as executor in the will and the principal beneficiary thereunder. He procured the witnesses and requested them to sign as attesting witnesses, under circumstances indicating that it was his will rather than hers.

Section 2 (chap. 148, Ill. Rev. Stats. 1939) on Wills, provides that before a will is entitled to probate four things must occur, namely: the will must be in writing and signed by the testator or testatrix, or by some one under her direction; it must be attested by two or more credible witnesses; two witnesses must prove that they saw the testatrix sign the will in their presence, or that she acknowledged the same to be her act and deed; and that two or more witnesses must swear that they believed the testatrix to be of sound mind and memory at the time of the signing. The last requirement is entirely absent in this proceeding. Neither of the attesting witnesses was of the opinion that the testatrix was of

partiallist specific lines were cold use book , was siled with bain rod fadi , smoo To efate a paidsoon os eaw reasul? . eri tadi was clouded and hasy and that she had no clear conception of the disposition of her property. The record does not indicate that alyos has for his one jail reals al ti bus and of heer aum Lliw out not read it hereaft. Altereas for proposent testified generally ted nees bad .. arsey your for red mount bad yead fad foothe add of twenty or thirty days before the will was emocuted, and that the appeared to be of sound mind. But none of these witnesses had seen her at or about June 6, after she had become persenently confined to bed. Thise it is true that where a withess who has subscribed to a will, stating in the attestation clause all the facts regulred a of animal end on alliest . Ille end to action on the heartan contrary state of facts, his or her testimony should be closely scrutinized; neverticless, the evidence in this case relative to the circumstances under which the will was made, and the physical and mental condition of the testatrix, overvielminaly demonstrates the she was physically and mentally unable to make a will, In fact. rebut beragers and incompanial that the transport was all more errors it the direction of proponent, who was mared as encutor in the will and the principal beneficiary thereunder. He procured the witnesses and requested them to sign as attesting witnesses, under circumstances indicating that it was his will rether than here,

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sound mind and memory when she made the will, and under all the circumstances of this case we think it was error for the Circuit court to admit it to probate. Therefore, the order of the Circuit court is reversed and the cause is remanded with directions to enter an order denying the admission to probate of the alleged will.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

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CHORR REVERSED AND CRAFES REMANDED WITH DISCRETIOND.

"senler and 'ullivan, JJ., concar,

ALEX W. SCHULTZ (Plaintiff and counter defendant below),

ppellant

V.

SADIE K. SCHULTZ (Defendant and counterclaimant below),
Appelled

PPEAR FROM SUPERIOR COURT,

307 1.A. 3782

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, Alex W. Schultz, filed a bill for divorce against his wife, Sadie K. Schultz, charging specifically several acts of cruelty. Defendant thereupon filed a counterclaim for separate maintenance, also charging cruelty, and alleging that plaintiff had left her April 20, 1938, without any cause, ground or provocation, refusing to return and cohabit with her, although requested to do so. A full hearing was had before the chancellor, resulting in the dismissal of plaintiff's bill and the entry of a decree in favor of defendant, awarding her custody of a minor daughter born of said marriage and \$31 a week for separate maintenance, as well as attorneys' fees and costs of the proceeding.

The Schultzes were married in June, 1919, and resided together from that time until April 20, 1938, except for a short period of separation in 1925. For some time prior to the final separation they occupied separate living quarters under the same roof and did not cohabit as husband and wife. Mr. Schultz was engaged in the scrap iron business, and his older daughter, Esther, who was 19 years of age at the time of the trial, was employed at his place of business. The younger daughter, Miriam, who was 16 years of age at the time of the trial, attended school.

The specific acts of cruelty charged by plaintiff are alleged to have occurred May 15, 1937, July 18, 1937, and April 29, 1938. Plaintiff testified that on the first of these dates defendant struck him on the head with both hands, from which he sustained

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MADIX E. SCHLETT [Owledge and lowl)

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The specific acts of cruelty charged by plaintiff are alleged to have occurred May 15, 1937, July 18, 1937, and ipril 29, 1938. Plaintiff testified that on the first of these dates defendant struck him on the head with both hands, from which he sustained

bruises. Dr. Billow, the family physician, offered corroborating testimony for this act of cruelty, testifying that when he was called in May, 1937, Mrs. Schultz was very nervous and sick in bed and from the conversation and history it appeared that Mrs. Schultz, in a moment of hysteria, had wanted to commit suicide and exert violence against her husband. He said that Mr. Schultz's head was a "little bit scratched," and that he administered morphine by hypodermic to quiet Mrs. Schultz, and continued to administer sedatives for several days thereafter until the parties stopped calling him.

Ben Friedman, another witness called on behalf of plaintiff, had known the parties for upward of twenty-five years, and had, together with his wife, visited their home many times. Friedman testified that Mrs. Schultz indulged in a great deal of argument with her husband and that he had a conversation with her about their domestic affairs in South Haven, Michigan, in July, 1937. While there, he noticed a mark on Mr. Schultz's forehead, and upon inquiry was told by Mr. Schultz that his wife had struck him.

Ben Schiffman, another witness, testified that he was not well acquainted with Mrs. Schultz, but had known her husband for about ten years; that in March, 1938, he visited Schultz's place of business and as he entered the office he heard an argument attended by considerable "hollering and talking real loud;" that as he was about to leave the office Mrs. Schultz raised both hands and struck her husband in the face. Sam Schultz, plaintiff's brother, testified generally that Mr. Schultz was a good husband, but that his wife did not treat him well; that March 25, 1938, she came into Schultz's place of business and asked for some money and refused to leave "until she got the money," and struck him over the head; that several weeks later in April, 1938, Mrs. Schultz came to the shopand againsked for money, requesting \$200. When Mr. Schultz told her that he did not have it she "grabbed a piece of iron off the floor and hit him on the

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shoulder; that his shoulder was bruised; that then he turned to call the police she walked out, and practically ran away."

on behalf of defendant and in support of her charges of cruelty under the cross bill, Al J. Schultz testified that he had appeared in court under subpoena; that he was a cousin of plaintiff, and had been engaged in business with him from 1927 to 1930, and from 1932 until 1938; that from his observation Nrs. Schultz did not treat her husband "any different than any wife treats her husband. He had an awful bad temper. I never saw an exhibition of his temper at any of my visits at his home, but saw it once at the shop." He had seen Mrs. Schultz in the shop on only one occasion, in March, 1938. The parties were still living together at the time. Mrs. Schultz came in and asked for \$200. The witness testified that Mr. Schultz "got hot and hit her and she fell down. Abe Altman grabbed him and pulled him away from her. She picked herself up and walked away. She did not hit him on that occasion. I never saw her in the shop again at any time."

It appeared from evidence adduced upon the hearing that Mr. Schultz was on very friendly terms with a Mrs. Ross, mother of three children, who was separated from her husband. Mrs. Gussie Goldstein, called on behalf of defendant, testified that she had known the Schultzes for about ten years, had visited at their home and had met them at social functions and at summer resorts on several occasions, and that Mrs. Schultz had always treated her husband with consideration. She said that the last time she saw Mr. Schultz was in 1938, in South Haven; that he had a woman in his car and when the witness inquired what had become of his family he said he had filed a bill for divorce; that in July, 1939, she saw Mr. Schultz sitting on a bench on the pier with another woman, "with their heads together."

The older daughter, Esther, likewise appeared in court in response to a subpoena. With reference to the occasion in May, 1937, she testified that her father and mother had had an argument, and

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that her mother became hysterical and fell to the floor. Dr. Billow was called and administered sedatives to quiet her. She testified that she had never seen her mother strike Mr. Schultz nor had she seen any bruises on her father at any time. She said that the parties got along fairly well together, except for occasional arguments such as occur in many households. She said that for about a year prior to the separation her father and mother were not on speaking terms, but living in the same house and occupying different rooms. "Father did not make an effort to speak to her, but she on fifteen or more occasions made efforts to speak to him. His response was to leave him alone." She then related her observations with reference to Mr. Schultz's relationship with Mrs. Ross. The witness had first met Mrs. Ross at a card party, and later saw her at South Haven, where she occupied a cottage several miles from that of her mother's. She testified that Mrs. Ross was in South Haven from July, 1937, until September of that year, and produced three letters written by Wrs. Ross to her father, dated respectively July 29, 1938, August 5, 1938, and August 12, 1938. All these letters are of an endearing and intimate character and indicate a close relationship between the parties. In one of them she says that when evening comes she gets "so lonesome that I just don't know what to do with myself. I do hope that maybe you will be able to come here & stay for a few days, that would be wonderful. * * * I will be waiting for your call Sat. so until then I remain your Nettie." In the second letter she says that "I found your letter and believe me I was overjoyed. * * * Do not forget that I shall wait for you Saturday night. Your Nettie." In the third letter she again acknowledges receipt of a letter from Mr. Schultz, and says that she is glad that she 'phoned him yesterday, because she was very restless and felt much better after she had talked to him. "You inquire if I would care to stay here another week. I do not know what to say, because while it is indeed extremely hot, I can not enjoy my stay here because I am very

that her mother becene hysterical and fell to the floor, Dr. odi . Ted jaing of asvitabes berejakulade bus belles sew wellte addition . The entries recitors rank more rayon back and self-theof nor had she seen any bruises on her father at any time. She said that the parties got along lainly well together, except for ablements are occur in many necessions. redion has reditat red noidsreger end of roing reey a trode red fant were not on speaking terms, but living in the some house and decemping different rooms, "Father did not make an effort to speak to her. but she on fifteen or more occasions made efforts to speak She then related to him. His response was to leave him slone." Mrs. Ross. The witness had first met Mrs. Noss at a card party. several miles from that of her mother's. One testified time line, Ross was in South Haven from July, 1937, until deptomber of that year, and produced three letters written by Mrs. Noss to her father, dated respectively July 29, 1938, namet y, 1938, and suguet 12, 1938. All those letters are of an enderring and intimate character and indicate a close relationship between the parties. In one of I then says that when evening comes she gets "so lonesome that I now educat the most to do with myself. I do no sale that more supplied in the sale of the ad bluow tody , sych wal a rol yate & ared amos of alda ad film lifuy oz . fel flag your or griffing of Illw I * * * Turney your then I remain your Mettle." In the second letter she says that "I found your letter and believe me I was overjoyed. * * * Do not forget that I shall wait for you Seturday might. Your Notite." third letter she again acknowledges receipt a letter from Mr. Schultz, and says that she is glad that she 'phoned him yesterday, bad ade refler refler that all fell man actions yet all and see see all see al balked to blar. "Tent legaling if I want over to stay large another wook. I do not know what to say, because while it is indeed extremely hot, I can not enjoy my stay here because I am very much lonesome for you. However, we will see about that when you come out here whether I am to stay here or go home."

Esther Schultz further testified that she visited the cottage of Mrs. Ross in the summer of 1937, and later had a conversation with her father. She told her father that she had asked Ers. Ross to leave him alone, to which Mrs. Ross replied, "I am sorry, you better go to your father and talk to him. Don't come and talk to me." She said that in the course of this conversation her father said that Esther "could not dictate his friends to him." and that he was "old enough to choose his friends for himself, and * * * to do whatever he pleases." She further said that she had talked to him at other times about Mrs. Ross, and that he always made the same reply. Esther also testified that during this period she had occasion to hear from Mrs. Ross, who telephoned to the home of Mrs. Schultz on two occasions and asked for Mr. Schultz. Esther's testimony was generally to the effect that she loved both her father and mother and did everything possible to promote harmony between them; that Mr. Schultz was a good husband and father, and that Mrs. Schultz treated him with consideration.

After the separation Mr. Schultz took an apartment in the same building where Mrs. Ross lived and Esther testified that she frequently saw his automobile parked in front of the house.

The younger daughter, Miriam, who was attending high school at the time of the trial, said that she had never seen her mother "raise a hand to strike father," and that although her father swore at her mother, she had never seen him strike her.

Earl Schultz, plaintiff's nephew, testified that he was employed at his uncle's office in the summer of 1937 and until September, 1938; that he knew Nettie Ross, and had seen her in the place of business in his uncle's company. He had also talked to her on the telephone on several occasions and conveyed messages from her to Mr. Schultz, and mailed letters from him addressed to Mrs. Ross.

After a full hearing the chancellor was of the opinion

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that the complaint was not sustained by the evidence and said:

"I believe that she has had more trouble with him than he has
with her, and when he says he has been a dutiful husband - I am
inclined to think that you don't get to be a dutiful husband by
carrying on an affair with another married woman with three children, and that seems pretty well established by the evidence. * * *

I think he has made out a case of separate maintenance. I believe
\$31 a week would be a proper order for support. * * * You may
present a decree. * * * For the benefit of the record we are basing
the finding on a \$65 a week drawing account. Two Hundred eightyfive dollars attorney's fees and costs of this proceeding. * * *."

As ground for reversal it is urged that the decree for separate maintenance is not supported by the evidence; that separate maintenance, being a statutory remedy, the defendant must prove that she is without fault, and that the court erred in dismissing plaintiff's complaint. While it is fairly clear that the parties were incompatible and had frequent arguments over matters which are not related to the charges of cruelty, it is undisputed that Mr. Schultz left his wife's home without any explanation and after having apparently planned to leave for some time in advance. Nothing occurred April 20, 1938, or immediately prior thereto, to justify his leaving. It is evident that many of the altercations described by the witnesses resulted from his relationship with Mrs. Ross; that Mrs. Schultz knew all about this affair and rightfully resented it. The chancellor who heard the evidence was in a better position to judge of the credibility of the witnesses who testified for the respective parties affecting the charges of cruelty and misconduct, and after a careful examination of the record we are not disposed to disturb his finding.

Plaintiff complains as to the allowance made for alimony and support of the younger child. The chancellor based this on an income of \$65 a week. The allowance of attorneys' fees is not questioned. The record shows that according to plaintiff's own testimony he drew approximately \$60 a week, and sometimes as much as \$100, from the

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corporation of which he was a half owner. In addition to that he was paid his daily expenses, such as meals and incidental expenses, and was provided with an automobile for his private use. The business operated by plaintiff and his brother deals in waste material in which daily purchases are made of approximately \$200 to \$300. The sales of the company run from \$6,000 to \$10,000 a month, making an annual turnover of about \$100,000. The plant on which the business is operated is owned by the corporation, and consists of two buildings. Defendant, on the other hand, has no income whatsoever and is entirely dependent upon plaintiff for support and maintenance. She has reached an age in life when there is no reasonable expectation that she can go out and earn any money. Her inability to perform any work except household duties left her entirely dependent upon the amount awarded by the court.

Defendant was clearly living separate and apart from her husband at the time of the trial and the chancellor found that it was without fault on her part. He was also of opinion that plaintiff's complaint was not proved. We find no convincing reason for disturbing the findings of the chancellor and the decree should be affirmed. It is so ordered.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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wollow on Tillven, JJ., concur,

41215

JACK SCHUMAN, Appellee.

V.

MARY DAUSCH, a widow, et al..

Defendants.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

ON APPEAL OF ISADORE WOLF,

307 LA. 879

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In 1933 Chicago Title & Trust Company filed a bill to foreclose a first mortgage, naming as defendants the owner of the equity, Isadore Wolf, judgment creditor, and others. While that suit was pending Jack Schuman, plaintiff herein, filed a bill to foreclose a second mortgage on the same property, also naming as defendants the owner of the equity, Isadore Wolf, the judgment creditor and other necessary parties. Wolf thereupon filed a motion to strike the second mortgage foreclosure complaint, upon the theory that it would cast a hardship upon him and other parties to the suit to incur the additional expense of defending two proceedings, that the two proceedings constituted a multiplicity of suits, and that the second complaint was filed for the purpose of harassing him and other defendants. The chancellor denied the motion. Wolf elected to stand by his motion and was defaulted and subsequently a decree of foreclosure was entered against him and others. Wolf appeals from the ruling of the court and contends that under par. 172, sec. 48, p. 2420 of chap. 110 (1939 III. Rev. Stats.) the court should have dismissed the bill because of a prior suit pending.

The rule is well settled that in order to sustain the plea of another action pending at law or in equity it is essential that it shall appear not only that there is a prior action pending

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Appealant.

Sport County.

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The rule is well settled that in order to sustain the plea of another action pending at law or in equity it is essential that it shall appear not only that there is a prior action pending

between substantially the same parties, but also that the cause or causes of action and the issues involved are substantially the same in the two suits. (I Corpus Juris cl.) The two suits in question were different and separate actions. One sought the foreclosure of the lien of a first mortgage trust deed, whereas the second action was brought to foreclose the lien of an entirely different and separate mortgage under a separate instrument.

Wolf's counsel argues that Schuman, complainant in the second suit, could have filed a cross bill in the first foreclosure proceeding and secured all the relief that he could hope to obtain by a separate suit. While this may be true counsel cites no authorities and we know of none which would require Schuman to proceed in that manner. In Torne v. Letts, 177 Ill. App. 288, the court said (p. 289): "Mastever the nature of said prior suit, we do not understand that Pretzsch could have been required to file a cross bill to foreclose his lien." Citing Jones on Mortgages, vol. 3, sec. 1445 and Mulcahey v. Strauss, 151 Ill. 70. In Mulcahey v. Strauss, 151 Ill. 70, plaintiff filed a bill to foreclose a mortgage to which certain of the defendants filed a plea alleging a prior suit pending which had made the holder of the mortgage party defendant. The plea was overruled and upon appeal the court said (p. 83): "We are not prepared to hold, that the appellee was obliged to assert her rights by such a cross bill, rather than by an original bill."

mortgagee must file a cross bill when he is made party defendant to a first mortgage foreclosure. The cases relied upon by welf involved generally suits where there was a prior suit pending by either the same plaintiff or some other person in a representative capacity acting for plaintiff under the same cause of action.

he are of opinion that the chancellor properly denied the motion to strike. The order of the Superior court is affirmed.

ORDER AFFIRMED.

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belf's counsel ergues that telmmen, confident in the sweetsers? Jacil and at ithis seems a bailth over bluce flor from a minido of each files of fait Taller oil ils bernees has gailessory by a separate suit. Infle this say be true councel eites no authorities and we know of none his would require Schwarz to proceed in that memor, in Yours v. Latts. 177 111. Apr. 285. the court said (p. 889): "Thatever the netwer to said and or berlaper need even blace densiers leds businebus for ob ex file a cross bill to foreeless his lion." Diting Jones on derlangers, vol. 25 von, 1847 and informing vol. after properties. 70. In Micchey v. Strauss, 191 111. 70, plaintiff filed a bill Leffi education end to mixtue delive of egaptron a escluered of a plea elleging a prior suit pending which had made the holder of the newtype forty services; the case or recently and que appeal the court said (y. 83): "he are not prepared to hold, that . Hit acoro a fishe ye athair red breas of begilde asw selleggs edf ". Ilito Lanigiro ne vd manij redier

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THE MORTHERN TRUST COMPANY, an Illinois corporation, as Trustee, et al., (Plaintiffs) Appelles,

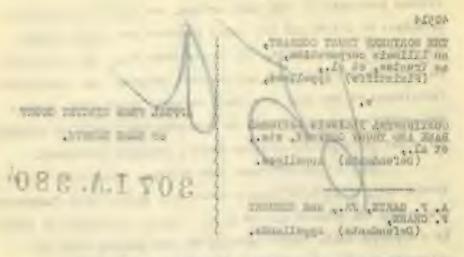
CONTINENTAL ILLINOIS MATIONAL BANK AND TRUST COMPANY, etc., et al., (Defendants) Appelless.

A. F. GARTZ, JR., and HERBERT P. CRANE, (Defendants) Appellants. OF COOK COUNTY.

307 I.A. 380

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A complaint, and amendment thereto, in equity was brought by The Northern Trust Company, as trustee (Emily H. Junkin, who was Emily Mutchinson Crane, the widow of Richard T. Crane, deceased, was subsequently joined as co-plaintiff), against the executors of the will of Richard T. Crane, Jr., deceased, and the trustees thereunder, and Florence H. Crane, the surviving widow of Richard T. Crane. Jr., as distributees of his estate, and Charles R. Crane. to enforce against them certain obligations assumed by Richard T. Crane, Jr., and Charles R. Crane under a contract with Emily Mutchinso Crane, dated December 2, 1912, to provide her with an annual income of \$100,000 during her lifetime. The complaint as amended sought to enforce against defendants Kate C. Gartz, Mary C. Russell, Frances C. Lillie, Emily C. Chadbourne and Herbert P. Crane, sisters and brother of Richard T. Crane, Jr., and Charles R. Crane, and against A. F. Gartz, Jr., as assignee of Kate C. Gartz, certain obligations which it is alleged the said sisters and brother had assumed toward Emily M. Junkin under the terms of a so-called family settlement agreement dated June 11, 1914, as supplemented by a trust agreement entered into by them with The Northern Trust Company, as trustee, under the same date, which was attached to and made a part of the



MR. JUSTICE SCANKAN DUKIVUNED THE OFINION OF PHE COURT.

A complaint, and according thereto, in equity was brought by Mur Murthern Mrust Congary, so boostes (Belly E. Resta, die sea Maily Mutchinuon Crane, the widow of Michard T. Crane, decouned, was subsequently joined as co-plaintiff), egainst the executors nethern her has abstracted and general at baseline to like and to thereunder, and Florence H. Crane, the surviving widow of Michaed T. Crane, Jr., as distributees of his estate, and Charles R. Crane, .T branch ye bemuse suchingillo misjres ment faming sorohes of Crane, Jr., and Charles E. Crane under a contract with Ently Butchingd Crane, duted Decomber 2, 1912, to provide her with an annual income of \$100,000 during her lifetime. The completet as amended sought to ontores against defendants take C. Sarts, Engy C. Tannilla Process C. Lilli, Cally C. C. Course on Total J. Cours, Crick and brother of Hichard T. Orane, Jr., and Charles R. Crame, and against a. J. World, Jr., as assigned by Cate I. Copys, serticing online Cours which it is alleged the said sisters and brother had assumed toward Emily M. Junion under the terms of a so-called family settlement terminal found and outside our companies of the court of the court entered into by them with me continue and the continue to continue to the cont out to draw a star Lond of Profession and affect and the same and the

family settlement agreement as Exhibit E. The complaint as amended also sought personal recovery from the said members of the Crane family of existing deficits between the income actually received by Emily H. Junkin under the various trusts in question, and the amount of her guaranteed income. The complaint as amended also asked that the court retain jurisdiction of all the parties to the action to determine the amount of future deficits and to enforce the collection thereof. Charles R. Crane and the distributees of the estate of Richard T. Crane, Jr., deceased, filed a counterclaim in which they claimed that by virtue of the family settlement agreement and related documents their four sisters and brother Herbert had assumed five-sevenths of the liability to Emily A. Junkin for the deficits, each severally to the extent of one-seventh thereof; that as between the counterclaimants on the one hand, and the four sisters and Herbert on the other hand, the primary liability for five-sevenths of the liability for the deficits rested upon the said four sisters and Herbert (severally to the extent of one-seventh each), and that the counterclaimants had the right to compel the said sisters and Merbert to perform their respective obligations to Emily H. Junkin in exoneration of the liability which Charles R. Crane and Richard T. Crane, Jr., had initially assumed to her. Both plaintiffs and counterclaimants claimed that it was not necessary, in order that the liability of the four sisters and Herbert be enforced, that the deficits be first paid to Mrs. Junkin either by Charles R. Crane or by the distributees of the estate of Richard T. Crane. Jr., deceased; that all of the parties in interest were before the court and the court had full jurisdiction to determine and adjudicate their respective obligations. Both plaintiffs and counterclaimants also claimed that the reduction of the guaranteed income of Mrs. Junkin from \$100,000 to \$35,000 inured solely to the benefit of Charles R. Crane and Richard T. Crane, Jr., and his distributees (to the extent of one-half each)

fomily settlement agreement as Indicha as inemestry inemplates without elso sought personal recovery from the sade sembers of the Grane family of existing deficits between the income setually received by Umily E. Judita ander the various tracks in cacation, and the cals brings as tabliaged. The complete as amended to ent of coling out the To molicibalist, whater trues out faut bodas ection to determine the caculat lo frame, and the animates of notice the collection thereof. Charles R. Crane and the distributees of the estate of Alchard V. Crene, Jr., deceased, filed a counterciain in which they claimed that by virtue of the family settlement agreetradical related describer four sixters and brother Morbert had assumed five-sevenths of the limbility to fully H. Jundin for the deficity, each severally to the extent of occ-seventh thereof; that as between the counterclaimants on the one hand, and the four satters and Norbert on the other head, the primary liability for said mean between adjoined and not millidell and to anthrever-evil lo insine sai or willsteves) igodrell bas erejais quol biss one-seventh each), and that the counterelements had the right to compel the said sisters and Herbert to perform their respective obligations to Maily H. Junkin in exercises of the liability which Charles R. Crans and Richard T. Crans, ir., bad inditally assumed to her. Both plaintiffs and counterelaiments claimed that it was not necessary, in order that the liability of the four sisters and lorbert be enforced, that the deficits be first paid to live. Junkin of ther by Charles R. Creme or by the distributees of the seitrag car to lis tent theseeses, it, eased it bredsis to etate - interest were before the court and the court had full jurisdict tion to determine and adjudicate their respective obligations. mails are and fact are also only translate temporal and thirteening order of the guaranteed income of Mrs. Junkin from \$100,500 to \$35,000 inured solely to the benefit of Charles A. Crame and Richard T. Crane, Jr., and his distributess (to the extent of one-half each) and that the respective liabilities of the four sisters and Herbert should be enforced upon the basis of \$100,000. Both plaintiffs and cross-complainants also claimed that the jurisdiction of the Probate court of Cook county, in which the administration of the estate of Richard T. Crane, Jr., was pending, was inadequate for the determination and adjustment of the rights and interests of the several parties to the action and that therefore it was necessary to invoke the jurisdiction of a court of equity for that purpose.

The decree finds that each of the defendant members of the Crane family, save Kate C. Gartz and Herbert P. Crane, has fully discharged his or her obligation under the so-called family settlement agreement and the record shows they have abided by the decree entered in this cause. A. P. Gartz, Jr., and Herbert P. Crane have filed a joint appeal.

The essential facts in the case are not controverted and in they are stated clearly and/sequential order in the findings of the court. To understand the contentions raised by appellants it is necessary to state the trial court's findings of fact and the decretal part of the decree. They are as follows:

as party of the first part, and Emily Hutchinson (now Emily H.

Junkin, one of the plaintiffs herein), party of the second part,
made * * * a certain Marriage Settlement Agreement, in pursuance
of which said * * * [Crane] gave * * * and conveyed to said * * *

[Hutchinson] certain bonds of the Atchison, Topeka & Santa Fe
Railroad Company, of the par value of \$115,000, bearing interest
* * *, as and for her absolute estate and property, and in addition
thereto assigned, transferred and conveyed to The Northern Trust
Company, as Trustee, certain other securities therein described,
to have, hold, manage, control and care for and collect the income
therefrom, and to pay the net income therefrom as received to said

and that the respective liabilities of the four elaters and herbert should be enforced upon the basis of (100,000. Both plaintiffs and cross-complaintable also elaised that the jurisdiction of the Probate court of Cook county, in thich the abilititization of the estate of lichard ?. Crane, Jr., was product, as incherate for the determination and adjustment of the rights and interests of the several parties to the action and that therefore it was necessary to invoke the jurisdiction of a court of equity for that

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The decree finds that each of the defendant newbers of the decident f. drone, has fully acted to the charged his or her obligation under the so-malled femily sottiem ment agreement and the record shows they have abide d by the accree entered in this cause. A. . Garts, dr., was satisfied a form appeal.

The essential facts in the case are not controverted and they are stated clearly and/sequential order in the finulage of the court. To understand the contentions raised by appellants it is assary to state the trial court's findings of fact and the decretal part of the decree. They are as follows:

"I. That on Ostober 13, 1903, hickers T. Crane, * * *
as party of the first part, and Maily Matchinson (now Emily M.
Junkin, one of the plaintiffs herein), party of the second part,

one * * * a certain Harriage Settlement Agreement, in pursuance

limited inson] certain bonds of the Atchicon, Topeks & Santa Fe

illustration of the state and property, and in addition

thoreto assigned, transferred and conveyed to The Horthern Irust

Company, as Trustee, certain other securities therein described,

to have, hold, manage, central and care for and collect the income

to have, hold, manage, central and care for and collect the income

* * * [Crane] during his life, and after his death to pay the same to said * * * [Mutchinson] quarterly, during her life, provided she should survive said * * * [Crane]. That * * * pursuant to the intention of said parties, as in said agreement expressed, said marriage was consummated and The Morthern Trust Company, as such Trustee, assumed and took control and management of said securities so transferred to it, as aforesaid, and paid the net income therefrom to * * * [Crane] during his lifetime, and since his death has paid the same to * * * Emily H. Junkin * * *.

"2. That on January 8, 1912, the said Richard T. Crane * * * died, leaving * * * his widow, him surviving, and on December 2, 1912, the defendants Charles R. Crane and Richard T. Crane, Jr., sons of said party of the first part, for good and valuable considerations therein * * * set forth, entered into an agreement with said Emily Mutchinson Crane * * * in and by which they severally agreed with * * * [her] that from the net income derived from said securities so given and transferred to her by * * * Crane, Sr., as aforesaid, and from said securities so transferred and delivered to the Worthern Trust Company, as Trustee, as aforesaid, together with the income from 5.000 shares of the capital stock of Crane Company, to be by them severally (each 2500 shares thereof) transferred to and deposited with The Morthern Trust Company as such Trustee (and which were thereupon issued and transferred to The Northern Trust Company as such Trustee), she * * * should receive an annual net income, without any deduction whatsoever, of the aggregate sum of \$100,000 during her lifetime. In and by said Agreement * * * Charles R. Crane and Richard T. Crane, Jr., further expressly agreed with Emily H. Crane (* * * now Emily H. Junkin) that in case the net income received by The Morthern Trust Company, as such Trustee, and and under said Agreement paid to her under said Marriage Settlement Agreement/of December 2, 1912, including the net income derived from said securities so given to her by * * * Crane, Sr., as aforesaid, should in any year during her life fall short of said aggregate sum of \$100,000, then * * *

* * * [Crane] turing his life, and after his death to pay the same to said * * * [Auteniacon] quarterly, during her life, provided she should survive said * * * [Crane]. That * * pursuant to the intention of said parties, as in said agreement expressed, soid marriage was consummated and The Northern Trust Company, as such Trustee, assumed and took control and management of said securities so transferred to it, as aforesaid, and paid the net income therefrom to * * * [Crane] during his lifetime, and since his death has paid the same to * * * Emily N. Junkin * * *.

That on January 8, 1912, the said Michard T. Crane * * died. leaving * * * his widow, ida surviviar, and on December 2, 1912, the defendants Charles H. Crame and Hishard T. Crame, Jr., sons of said party of the first part, for good and valuable considerations therein * * * set forth, entered into an agreement with said Imily Mutchinson Crane * * in and by which they severally bise mort bevireb eason! Jen edf mort tant [red] * * dille beergs securifics so given and transferred to mer of we we work or . ac of boreviled has berrelement on coldinate him more has biscords the Northern Trust Company, as Trustee, as aforesaid, together with the income from 5,600 shares of the expital steek of Grane Company, to be by them severally (sach 2500 shares thereof) transferred to and deposited with The Lorthern Trust Company as such Trustee (and tourt ared thereup and transferred to the Morthern Trust Company as such Trustee), she * * should receive an annual met To muse singergue self to erevectative notificable yes fundity, emooni \$100,000 during her lifetime. In and by said Agreement * * * Charles A. Crane and Richard T. Crane, Jr., further expressly egreed with Buily H. Crane (* * now Emily H. Junkin) that in case the net Example of the local training from the property of the property and the property of the proper and under said Agreement - To increase of the city of the property of the contract of the 1912, including the not income derived from said securities or given to her by * * * Crane, Sr., as aforesaid, should in any year during her life fall short of said aggregate sum of \$100,000, then * * * Charles R. Crane and Richard T. Crane, Jr., would, on demand, pay to Emily H. Crane, or to her order, one-half of such deficiency,

"That The Northern Trust Company thereupon accepted said 5,000 shares of capital stock of Crane Company, as such Trustee, and agreed to hold the same, together with the securities so held by it under said Marriage Settlement agreement * * *, and thereupon one of the originals of said Agreement last mentioned was at the same time deposited with The Northern Trust Company, as such Trustee, for the purpose of enabling it to comply with the terms thereof.

"Said Agreement of December 2, 1912, expressly provided that the dividends and income derived from said 5,000 shares of stock The Northern Trust Company, as Trustee, should first pay its reasonable charges for its services in acting as Trustee under said Agreement and in collecting and paying over the income from said shares, and also its reasonable charges for acting as Trustee under said Marriage Settlement Agreement from the date of said Agreement of December 2, 1912, and for collecting and paying over the income to said second party pursuant to said Marriage Settlement Agreement, and also all taxes, assessments and governmental charges of every kind which might be levied, assessed or imposed at any time thereafter, during the life of said second party, upon the trust property held by said Trustee under said Agreement, and upon the trust property held under said Marriage Settlement Agreement, and upon said bonds of the Atchison, Topeka and Santa Fe Railroad Company; and should pay to said second party quarter-yearly so long as she should live so much of said dividends and income as should be required to make her net annual income, including the net amount of income she should receive under said Marriage Settlement Agreement and from said Atchison * * * Bonds the sum of \$100,000 per year.

"That on June 11, 1914, Charles R. Crane and Richard T. Crane, Jr., together with defendants, Kate C. Gartz, Mary C. Russell, Frances C. Lillie and Emily C. Chadbourne, their sisters, and Herbert P. Crane, their brother, for good considerations therein named, entered into an agreement commonly known and referred to by them

Charles R. Grane and Richard T. Grane, Jr., would, on demand, pay to imily M. Crane, or to her order, one-half of ruch deficiency,

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"That The Morthern Trust Company thereupon accepted said 5.000 shares of espital stock to Crane Company, as such Trades and agreed to hold the same, together with the securities so held by it under said Marriage Detiloment agreement * * *, and thereupon ent to sew benefitness tool themserga bies to afenigine out to eno same time deposited with The Morthern Trust Company, as said Trustee, for the purpose of enabling it to comply with the terms thereof.

"Said Agreement of December 2, 1912, expressly provided to service 000, blas mort bevires emeant bus shashivib edd fadd stock The Northern Trust Company, as Truster, should first pay its reasonable charges for its services in acting as Trustee under said Agreement and in collecting and paying over the income from said shares, and also its reasonable charges for acting as Trustee under inemeeral bise to eith edi nort inemegal inemelites egairum bise of December 2, 1912, and for collecting and paying over the income tnemeough free City of the cot transcape for the cot second provided the cot and also all taxes, assesments and governmental charges of every waren't emit was is beenger to bessesse , belvel ed ingin noide bulid after, during the life of said second party, upon the trust preperty held by said Trustee under said agreement, and upon the trust property to abnot blaz nous bas tremental framestates easiers blaz vonus bled the Atchison, Topeka and Senta We Railroad Company; and should pay to said second party quarter-yearly so long as she should live so much of said dividends and income as should be required to make her not annual income, including the set coount of income and amount could could * * * notified bise more bus inemostral inemeliated egalated bise askur Houds the east of ELOO,000 per year,

That on June 11, 1914, Charles R. Crane and Richard T. Crams, Jr., constant with defendents, first in deres, dery C. sussailly Transpa C. Idilio and Haily C. Chadbourne, their sisters, and Worbert P. Grens, Chair brother, for good considerations therein named, entered into an agreement commonly known and referred to by them as the 'Pamily Settlement agreement,' by the terms of which Charles R. Crane and Richard f. Crane, Jr., agreed each with the other, to buy or sell from or to such other, or to cause or permit the said Crane Company to buy, each his interest in said Crane Company, and each of the said sisters and herbert P. Crane, brother of Charles R. Crane and Richard L. Crane, Jr., therein and thereby, severally and not jointly, expressly agreed to pay, on demand, one-seventh of all money which might become due and payable under the Agreement of December 2, 1912.

"In and by said Family Settlement Agreement it was further expressly agreed by and between the parties thereto, including Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, and Merbert F. Crane, that for the purpose of facilitating the collection of the aforesaid payments so agreed to be made by the parties to said Agreement, other than Charles R. Crane and Richard T. Crane, Jr., * * * Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Herbert P. Crane, Charles R. Crane and Richard T. Crane, Jr., individually, and Charles R. Crane and Richard T. Crane, Jr., as Trustees under a Trust Agreement to be executed by them and Emily C. Chadbourne, together with said Emily C. Chadbourne, should execute an agreement with The Northern Trust Company as Trustee, which Agreement should be in the form as set out in Exhibit E attached thereto and thereby made a part of said Family Settlement Agreement. Said Agreement, so referred to as Exhibit E, as aforesaid, was thereupon duly executed by all of the parties to the Family Settlement Agreement and by Charles R. Crane and Richard T. Crane, Jr., as Trustees under said Trust Agreement with Bmily C. Chadbourne, and by The Morthern Trust Company as Trustee thereunder. Said last mentioned agreement provided for the re-transfer of the said 5,000 shares of stock of Crane Company so theretofore deposited by them with The Northern Trust Company as Trustee, as provided by said Agreement of December 2, 1912, to Charles R. Crane and Richard T. Crane, Jr.,

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as the 'Paully Cottlement Agreement,' by the terms of which Charles R. Crame and Alchard T. Crame, St., agreed each with the other, to buy or sell from or to such other, or to cause or permit the said Crame Company to buy, each his interest in said Grame Company, and each of the said slaters and herbert F. Crame, brother of Charles R. Crame and Alchard 1. Crame, it therein and thereby, asverally and not jointly, expressly agreed to pay, on assaid, one-seventh of all money which might become due and jayable and r the Agreement of December 2, 1912.

Tenij tul and ii jmemeera jmemeljjel vlimst bioz vo bno ni expressly agreed by and between the parties therete, including hate C. Carta, Frances C. Lillie, Mary C. Russell, Mally C. Chachourne, and Herbert P. Crane, that for the purpose of facilitating the collection of the aforesaid payments so agreed to be made by tha perties to said Agreement, other than Charles R. Grene and Richard T. Crane, Jr., * * * Mate C. Gartz, Prances C. Lillie, Mery C. Manuell, Marbort F. Crass, Course L. Crass and Clause T. Crass, early individual gard as Trustees under a Trust Agreement to be eccueved by them and Unily C. Chadbourne, tegether with seld imily C. Chadbourne, should execute an agreement with The Horthern Trust Company as Trustee, which lyreeederent benezija i tididri ni juo tee en mret eni ni ed blucks jnom .thomsough insolited villed bine to fue a shem yeared bas Agreement, so referred to as lightly as aforest, so effection -court described without old sold and to the yellowed with ment and by Charles H. Crane and Richard T. Crane, Jr., as Tractees under said Trust Agreement with Raily C. Chadbourne, and by The services frust Company as Tracker boorsanier, and Lark meriances agreement provided for the re-transfer of the said 5.000 three or stock of Grane Company so theretofore deposited by them with The Northern Trust Company as Trustee, as provided by said Agroement of December 2, 1912, to Charles H. Crane and Michard T. Crane, Jr.;

respectively, 2,500 shares to each, and that in lieu thereof each of the said parties to said Family Settlement Agreement, except the Seller thereunder, should deposit with The Northern Trust Company as such Trustee, 1,000 shares of the Crane Company stock, and that said Seller should deposit certain other securities therein described.

Trustee, in accordance with the provisions of said Agreement Agreement hereinabove referred to as Exhibit E in said Family Tettlement Agreement hereinabove referred to as Exhibit E in said Family Tettlement Agreement hereinabove deposited with The Northern Trust Company, as such Trustee, in accordance with the provisions of said Agreement hereinabove referred to as Exhibit E in said Family Tettlement Agreement mentioned, the securities so agreed to be by them respectively deposited, 1,000 shares of Crane Company stock, and Charles R. Crane * * * thereupon deposited with The Northern Trust Company, as such Trustee, certain other securities as therein provided.

"Said Trust Agreement herein and in said Family Settlement Agreement referred to as Exhibit E, as aforesaid, expressly provided that The Northern Trust Company, as Trustee, should keep separate accounts with each of the parties thereto, collect the dividends from each 1,000 shares of stock transferred by the several parties who should have transferred stock to The Northern Trust Company under said agreement, and pay from the dividends received from each 1,000 shares one-seventh of all payments which should be made in accordance with the provisions of said Agreement of December 2, 1912, * * * and one-seventh of all moneys which Charles R. Crane and Richard T. Crane, Jr., covenanted by said Agreement of December 2, 1912 to pay, * * * the remainder, if any, of such dividends to be paid to the respective parties making such deposits. That in addition thereto The Morthern Trust Company should collect all interest which should be paid on the securities so deposited by Charles R. Crane, and pay therefrom one-seventh of all payments which should be made in accordance with

respectively, 2,500 sheres to each, and that in lieu thereof each of the said parties to said Family Scillement Agreement, except the Seller thereunder, should deposit with the Worthern Trust Company as such Trustee, 1,000 shares of the Crane Company stock, and that said Seller should deposit certain other securities therein described.

"Charles A. Creme became the Seller and Michard T. Creme, Jr., became the Buyer under the so-called Family Settlement Agreement, and theroupon the said 5,000 shares of Crame Company stock were so ro-transferred to Charles R. Grame and Michard T. Crame, respectively, 2,500 shares to each, and each of said prities to said agreement, except Charles R. Grame, deposited with The Forthern Trust Company, as such Trustee, in accordance with the provision. of said Agreement seinabove referred to as Arkibbit I in said Family Settlement Agreement sein tone, Mr. Crame Company stock, and Charles R. Grame deposited, 1,000 shares of Crame Company stock, and Charles R. Grame Trustee, deriain other securities as therein gravided.

"Said Trust Agreement herein and in said Family Settlement Agreement referred to as Ithihht E, as aforeseid, expressly provided that The Northern Trust Company, as Trustee, should keep separate mort some the counts with each of the parties there are the counts with each of the parties and the country and the country and the country are the country ar each 1,000 shares of stock transferred by the several porties who rebow yang transferred to the secretary of the company and blueds said agreement, and pay from the dividends received from each 1,000 shares one-seventh of all payments which should be made in accordance with the provisions of said Agreement of December 2, 1912, * * * and . - reventh of all moneys winich Charles R. Crane and Richard T. Crane, Tr., covenented by said Agreement of December 2, 1912 to pay, * * the remainder, if any, of such dividends to be paid to the respective nreditor such deposits. That in addition thereto fine Northern no bles of bloods ablie described IIs Joellos bloods games Jear. the securities so deposited by Charles R. Crane, and pay therefrom one-seventh of all payments which should be made in accordance with

said Agreement of December 2, 1912, as hereinbufore stated, and one-seventh of all moneys which Charles N. Crane and Richard T. Crane. Jr., covenanted in said Agreement of December 2, 1912 to pay, the remainder of such interest, if any, to be paid to Charles R. Crane. Said Trust Agreement also expressly provided that nothing therein contained should be construed to release Charles R. Crane and Richard T. Crane, Jr., in any way from any obligations which they have or have had under said Agreement of December 2, 1912, and that mothing therein contained shall be construed to change in any way any of the rights, obligations or duties of the parties to said Agreement of December 2, 1912, to each other. That by reason thereof Charles R. Crane and Richard T. Crane, Jr., and their respective heirs, executors, administrators, representatives and assigns remained primarily liable, as between themselves and Emily H. Junkin for any deficit which might thereafter arise between the income derived from said securities and said guaranteed annuity of \$100,000, each to the extent of one-half thereof.

"And the Court further finds that the Trust Agreement dated June 11, 1914, above and in said Family Settlement Agreement referred to, and the securities therein mentioned and thereafter so deposited with The Northern Trust Company, as Trustee, as aforesaid, were intended as and in fact constituted collateral security for the several undertakings and agreements of the respective members of said family, hereinabove mentioned, by the terms of which each of the said members of said family agreed to pay, on demand, one-seventh of all money which might become due and payable under said Agreement of December 2, 1912,

"In and by said Family Settlement Agreement it was further expressly covenanted and agreed by Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Merbert P. Crane that in case the dividends and income received by The Northern Trust Company, as Trustee, from the shares of stock and the securities so agreed to be and which were deposited with The Northern Trust Company, as Trustee, as aforesaid, should be insufficient to pay all moneys due

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seld Agreement of December 2, 1912, as herefire stated, and one-seventh of all moneys windeh Charles B. Grame and Alchard T. Crane, Jr., covenented in said arreament of December 2, 191 to pry, tim partially of early live and live are to are the later to relation misteria guinfor dead bebivore threatene only increased that bigg contained should be construed to release Charles R. Orane and Alcherd T. Craue, Jr., in thy may from any obligations which they have or have had under seld Agreement of December 2, 1912, and that nothing therein contained that to construed to change in any way any the To Imensery. Lies of coltrag out to settle to enoticalide . within December 2, 1912, to each other. That by reason thereof Charles A. produced a state of the company of the contract of the contrac administrators, representatives and assigns remaised primarily liable, on between Change and Hally S. Stooms Du our Service with an excellent has askituese bing mort bevireb emeant and meemted sales restagrands said garranteed enquity of \$100,000, each to the entent of one-half LIBRORES ...

"And the court further finds that the Trust Agreement deted
June 11, 1914, above and in said Panily Schilment Agreement referred
to, and the securities therein mentioned and thereafter so deposited
with The Northern Trust Company, as Trustes, as aforesaid, were intended as and in fact constituted colleteral security for the several
undertakings and agreements of the respective members of said family,
hereinabove mentioned, by the terms of which each of the said members
of said family agreed to pay, on demand, one-seventh of all money which
might become due and payable under said Agreement of December 2, 1912,

and payable under the Agreement of December 2, 1912, then and in such case that they, said sisters and brother of Charles R. and Richard T. Crane, Jr., would each pay to the 'high bidder,' on demand, one-seventh of any sum which such 'high bidder' might be compelled to pay to The Northern Trust Company, as Trustee, in order that he might fully perform the terms of said Agreement of December 2, 1912, on his part to be performed.

"Said Family Settlement Agreement further provided that thereupon such 'higher bidder' agreed to indemnify and hold the 'Seller' harmless from any liability under said Agreement of December 2, 1912, beyond the liability which the 'Seller' had under said Family Settlement Agreement of depositing the securities therein provided for and of paying the difference between the income received therefrom and one-seventh of all sums which might be due and payable under said Agreement of December 2, 1912.

"By reason of the provision in said Family Settlement Agreement * * * Richard T. Crane, Jr., who become the buyer thereunder, became primarily liable as between himself and Charles R. Crane for six-sevenths of any deficit that might arise thereafter under the said Agreement of December 2, 1912, and by reason of the other provisions in said Family Settlement Agreement * * * each of the other parties to said Agreement, viz., Kate C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell and Herbert P. Crane became primarily liable as between themselves and Charles R. Crane and Richard T. Crane, Jr. for five-sevenths of any deficit that might arise thereafter under said Agreement of December 2, 1912, each to the extent of one-seventh of any such deficit, and Kate C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell, and Herbert P. Crane further became liable to Emily H. Junkin and to The Northern Trust Company as Trustee, each for one-seventh of such deficit, and also to Richard T. Crane, Jr., each to the extent of one-seventh of such deficit, and Charles R. Crane remained liable as between himself and his said sisters and his brother, Herbert P. Crane, for a like

and payable under the Agreement of December 2, 1912, then and in such case that they, said eisters and brether of Charles :.

and Richard T. Grane, Jr., would each pay to the 'high bidder' raight on demand; one-seventh of any sum thich such 'high bidder' raight be compelled to pay to The Horthern Trust Company, as Trustee, in order that he might fully perform the terms of said agreement of December 2, 1912, on his part to be performed.

thereupon such 'higher bidder' agreed to indomnify and hold the 'Seller' harmless from any liability under said Agreement of December 2, 1912, keyond the liability which the 'Seller' had under the mail of the paying the difference between the income received therefrom and one-seventh of all sums which might be due and payable

"By reason of the provision in said Family Settlement Agreement * * Hickerd E. Crane, Jr., who become the buyer thereunder, became primarily liable as between himself and Charles A. relicered seits inim tad fieleb you to enimever-kie tot ensto under the said Agreement of Documer 2, 1912, and by reason of the fices * * Inemeral inemelijed ylime's bize mi anoickvorg rento of the uther surther to meld agreement, vis., Date C. Cole, Practice C. Milita, Builty U. Charlicourse, Mary O. Suntuil and Merbert P. Crame became primarily lighle as between themselves and Charles H. Grame and Michard T. Grame, Jr. for five-sevenths of school to incherga bise reason nerthereast extra injust in the test of persons one tipiled hous yes to diverge one to incine and of does 1912. Late C. Deta, Trans. . Mills, city V. Chadedran, ery C. Mussell, and Herbert P. Crane further became liable to while of double and to the relations that Company is Tractions each for one-seventh of such deflett, and also to Richard T. Crane, Jr., each to the extent of one-seventh of such deficit, and Charles R. Crone remained liable as between himself and his said sisters and his brother, Herbert P. Crame, for a like

one-seventh of such deficit; provided, that upon p yment by Kate

C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell,
and Herbert P. Crane, or any of them, of their respective oneseventh portions of any such deficit to Emily H. Junkin, or to
The Northern Trust Company as Trustee, all liability to Charles
R. Crane or to Richard T. Crane, Jr. on account of the one-seventh
portion or portions of such deficit so paid, and all liability of
Charles R. Crane and Richard T. Crane, Jr. to Emily H. Junkin or
The Northern Trust Company, as Trustee, on account of the one-seventh
portion or portions of such deficit so paid, should be deemed to
have been satisfied and discharged.

"4. The Court further finds that on June 2, 1922, for good considerations by Emily N. Junkin received from Charles R. Crane and Richard T. Crane, Jr., their obligation under the Agreement of December 2, 1912, to pay to Emily H. Junkin during her lifetime the sum therein mentioned, was reduced from the sum of \$100,000, as therein provided, to the sum of \$85,000 per annum, and in accordance therewith Emily H. Junkin thereupon, on said June 2, 1922, duly notified The Northern Trust Company as Trustee that the said amount of \$100,000, payable to her annually under said Agreement dated December 2, 1912, had been reduced by the amount of \$15,000 in each year, one-half of which reduction, viz., \$7,500, was to be deducted in each year from the amount payable to her, Emily H. Junkin, from the income from securities deposited with said Trustee by Charles R. Crane and Richard T. Crane, Jr., respectively; and therein and thereby expressly authorized The Northern Trust Company, as such Trustee, to make said deduction from the date of said agreement last mentioned, from the amount which otherwise would be payable to her, Emily H. Junkin, in each year, from the income from the securities deposited with said Trustee by Charles R. Crane and Richard T. Crane, Jr., respectively.

"And the Court finds that in accordance with said Agreement of June 2, 1922, the obligation of Charles R. Crane and Richard T.

. .

one-seventh of each deficity provided, dest approved by Asta and Herbert P. Grame, or any of them, of their respective one-seventh portions of any such deficit to saily H. Audin, or to The Morthern Trust Company as Trustee, ell Hability to Charles R. Crame or to Richard T. Grame, Ar. on account of the conservation portion or pertions of such deficit so paid, and all liability of Charles R. Crame and Richard T. Grame, Ar. to Maily H. Jankin or The Morthern Trust Company, as Trustee, on account of the case-ceventh portion or pertions of such deficit so yell, should be decided to have been satisfied and discharged.

"4. The Court farther finds that on June 2, 1966, for

good considerations by Maily M. Jankin secsives from Charles R. Cream and Albinash T, drawn, Jr., Cours will, when asked Ins has of December 2, 1912, to pay to haily I. Junian during her Lifetime the sum therein mentioned, wer reduced from the sum of \$106,000, as therein provided, to the sum of this for annua, and in accordance therewith mally M. Jankin thereupon, on said June 2, 1924, duly January Alex only lead solured an question fourt manufact out beilijon of \$100,000, payable to her annually under seld igreement deted December 2, 1912, had been reduced by the emount of 415,000 in each year, one-held of wilch reduction, vis. 57,500, was to be deducted in each year from the amount payable to her, hally M. Junkin, from the income from securities deposited with soid Trustee by Charles N. Creme and Alchard T. Orane, Jr., respectively; and thorsan and dereign accessible arbitration from the front brust despects on mo Inchests bise to stab old mort notionbeb bine edem of personal of oldaying ad hivey calvando noline jayons end mort benelinen teal. her, Haily H. Junkin; in each year, from the income from the

of June 2, 1922, the obligation of Charles R. Crene and Richard T.

securities deposited with said Trustee by Cherles R. Crene and

Makers t. Cross, etc., respectively.

Crane, Jr. to Emily N. Junkin under said Agreement of December 2, 1912, * * * was reduced to a guaranteed annuity of \$85,000 per annum, for one-half of which guaranteed annuity each of them remained severally liable, but that said Agreement of June 2, 1922, did not affect the liability of each of the sisters and Herbert P. Crane * * * under said Family Settlement Agreement, and they, said sisters and brother, remained liable and are still severally liable each for one-seventh of any deficit in the net income from said securities under said sum of \$100,000 per annum.

"5. The Court further finds that since June 11, 1914, pursuant to the provisions of said Trust Agreement so made and entered into with it, and hereinafter referred to as Exhibit E, The Northern Trust Company, as Trustee as aforesaid, has kept separate accounts with each of the parties to said Family Settlement Agreement, and that until the execution of said Agreement of June 2, 1922, hereinbefore mentioned, said accounts were kept by said Trustee on the basis of the several liability of each of the parties to said Family Settlement Agreement for one-seventh of any deficit which might arise under said Agreement of December 2, 1912. That subsequent to the execution of said contract of June 2, 1922, by and between Charles R. Crane and Michard T. Crane, Jr., of the one part, and Emily H. Junkin, of the other part, said Trustee has properly kept said accounts upon the basis of the obligation of Charles R. Crane and Richard T. Crane, Jr. to pay or cause to be paid to Emily H. Junkin the sum of \$85,000 per annum, instead of \$100,000 per annum, and that in accordance with the direction of Smily H. Junkin to said Trustee, each of said parties to said Agreement of June 2, 1922, to wit, Charles R. Crane and Richard T. Crane, Jr., have been credited in said accounts, out of the income from the securities so theretofore deposited with it, as aforesaid, each with the sum of \$7,500 in each year from the amount payable to said Emily W. Junkin from the income from the securities deposited with said Trustee by

Orane, Jr. to Maily W. Jankin under said agreement of Bescher 2, 1912, * * * was reduced to a guaranteed annuity of \$87,000 per annum, for one-half of which guaranteed annuity each of them remained severally liable, but that said agreement of Jame 2, 1922, asine not affect the libility of each of the sisters and Marbart P. Orane * * * under said Family Scitlement Agreement, and they, said sisters and brother, remained liable and are still severally liable each for one-seventh of any deficit in the not income from said securities under said sam of \$100,000 per annum.

"J. The Court further finds that since June 11, 1914, has show or insmostrat fear? Blaz to ampicivory sait of immurant entered into with it, and hereinerter referred to as indibit I. The Morthern Trust Company, as Trustee as aforesaid, has kept Imamelijet vlimet hise of seliture out to dese dita cimpute of rund . Agreement, and that until the execution of said agreement of June In 1921, hiritharder annihmet, sid county see her her by add Trustee on the basis of the several lishility of each of the no dinevection to? inchesta immediated with a bias of selitage any deficit which might arise under suid agreement of December 2, 1912. That subsequent to the execution of said contract of June 2, 1922, by and between Charles A. Crane and Richard T. Crane, Jr.; of the one part, and hally H. Judin, of the other part, said Trustee has properly kept said accounts upon the basis of the Dillingham of Whirles W. Crues and dichard . Trung or, to com or cause to be paid to Emily H. Junkin the sum of 885,000 per annue, instead of \$100,000 per saute, and that in accordance with the direction of Emily H. Jankin to said frustes, each of said perties to ould agreement of June 1, 1922, to eit, Chirise R. Creme and Michaed T. Crame, Jr., have been credited in said accounts, out of the income from the securities so theretofors deposited with it, as aforesaid, each with the sum of \$7,500 in seed year from the count payable on seld delly it, dupin all from the income from the securities deposited with said Trustee by

Charles R. Crane and Michard T. Crane, Jr., respectively, on account of their several obligations as aforesaid.

"That said Trustee, since the execution of the said Family Settlement agreement of June 11, 1914, and the said Trust Agreement made in pursuance of, has rendered quarterly statements of account to each of the parties to said Agreements as therein provided, and upon the basis aforesaid, respectively, and that prior to the filing of the complaint in this cause and to the filing of the answers herein of the defendants, A. . Gartz, Jr. and Herbert P. Crane, no objection to the basis of the liability of the several parties to said Agreements, as shown by said accounts so rendered by said Trustee has ever been made by defendants, Kate C. Garts, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane, or any of them. That all of said defendants last named are of lawful age and fully competent; that by the accounts so rendered to them by said Trustee they were fully advised of the form, method and basis of stating said accounts, and that by their acts and conduct said defendants last above named are estopped to claim the benefit of any reduction in the amount for which they are severally liable because and by reason of the said contract of June 2, 1922.

Northern Trust Company for acting as such Trustee, as contemplated in and by said Agreements of October 13, 1903, December 2, 1912, and June 11, 1914, and the Trust Agreements pursuant thereto, were the sums shown by said quarterly statements of account and by the account of said Trustee heretofore filed herein, to wit: Two and one-half per cent. per annum upon the income from the securities deposited under and pursuant to said Marriage Settlement Agreement of October 13, 1903; one per cent. per annum upon the income from the securities deposited under and pursuant to said Agreements of December 2, 1912, and June 11, 1914, by Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, Herbert F. Crane and

est for

Charles H. Crene and Klahard V. Grano, Sr., respectively, on

"That said Truntee, since the execution of the said Family inancerna faur's bies and bue , Alth , il sout to increase in increase in a second in the contract of the cont in pursuance of, has remisered quarterly statements of account to each of the parties to anid Agreement as therein provided, and agon the basis aforesaid, respectively, and that prior to the filing of the complaint in wide cause and to the filing of the and were a large of the defendants, t. F. Sarta, for all to hireful at Crane, no objection to the basis of the liability of the deverel borther on educace bias yd awoda as admostra bine of selfung by said Trustee has ever been made by defendents, Eate C. Curtes Frances C. Lillie, Mary C. Mussell, Daily C. Chadbourne and Merbart P. Crene, or any of thom. That all or said defendants last amand es almossa sait will the sample that the decounts so rendered to them by each Trustee timey were likely advised to form, method and basis of stating said accounts, and that by thoir of beggers our hemen eveds to if the borde bine tonnece bus etcs claim the benefit of any reduction in the smount for which they are severally liable because and by reason of the said contract of June 2, 1922.

"The Court finds that the reasonable charges of The Lorthern Trust Company for acting as such Trustes, as contemplated in and by said Agreements of October 13, 1903, December 2, 1912, and June 11, 1914, and the Trust Agreements pursuant therete, were the sums shown by said quarterly statements of account and by the account of 11 Trustes beretofore filed herein, to with Two and on -nelf per cent. Per amount upon the income from the securities deposited under and pursuant to said Marriage Settlement Agreement of October 13, 1903; one per cent, per annum upon the income from the securitie deposited under and pursuant to said Agreements of the securitie deposited under and pursuant to said Agreements of the securitie deposited under and pursuant to said Agreements of the securities and June 11, 1914, by Mate C. Carter, Frances C.

Richard T. Crane, Jr.; one per cent. per annum upon the income from the securities deposited under said Agreements by Charles A. Crane up to March 18, 1924, and thereafter two and one-half per cent. per annum upon the income from said securities so deposited by Charles R. Crane.

"6. The Court further finds that by the terms and by reason of the said Agreement of June 11, 1914, hereinabove referred to as The Family Settlement Agreement, and said Trust Agreement hereinabove and in said Family Settlement Agreement referred to as Exhibit E, so made with The Worthern Trust Company in pursuance of said Family Settlement Agreement, as aforesaid, The Morthern Trust Company became a Trustee for and on behalf of each of the parties to said agreement for the collection and application of the income from said securities so deposited with it as aforesaid, and that it became and was the duty of The Northern Trust Company, as such Trustee, to collect and apply the income from said securities so held by it as aforesaid, and, in case of a deficiency in the income therefrom, to collect from the parties to said Family Settlement Agreement any deficiency which might or should arise between the amounts for which they became and were severally liable as aforesaid, and their respective shares of the income received from the securities so deposited by them respectively, as aforesaid; that by the express terms both of said Family Settlement Agreement, so-called, and said Trust Agreement made in pursuance thereof and bearing even date therewith, the same were made binding upon and to inure to the benefit of the parties thereto and their respective heirs, executors, administrators and assigns.

"7. The Court further finds that The Northern Trust
Company accepted the trusts in and by said agreement of December 2,
1912, and said trust agreement of June 11, 1914, imposed upon it,
and thereafter continued to collect the income from said securities
or the substitutes therefor so transferred to and held by it under

Richard T. Crane, Jr.; one per cent, per summa upen the income from the securities deposited under said agreements by Caerles R. Crane up to March 13, 1974, and thereafter two and one-half per cent. per ennum upon the income from said securities so deposited by Charles R. Crane.

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"6. The Court further finds that by the terms and by reason of the said agreement of June 11, 1914, hereinchove referred to as The Parily Settlement Agreement, and said Trust agreement as of bettelet imentary inemelijas ylimit bias mi bne evodsmiered Exhibit E, so made with The Northern Trust Company in pursuance of tent madify Settlement Agreement, as aforested, The Northenn Trans Company became a Trustee for and on behalf of each of the parties smooth and to noitraileds bus noitrallos ent tol thempers blue of then securities so deposit set it is it is secretary it become and was the duty of The Morthern Trast Company, as such Trustee, to collect and apply the income from said securities so held by it as aforesaid, and, in case of a deficiency in the income therefrom, to collect from the parties of and Family of themet out nearled with blucks to Julia doliw your lefted you income orga amounts for which they became and were severally liable as aforesaid, and their respective shares of the income received from the securities se deposited by them respectively, as aforeseid; that by the expression bica bas belies-oz twemerza tremelited will be to died armed Trust Agreement made in pursuance thereof and bearing even date therewith, the same were made binding upon and to inure to the endit of the parties there's and their respective heirs, executors, administrators and assigns,

Company accepted the trusts in and by said agreement of December 2, 1912, and said trust agreement of June 11, 1914, imposed upon it, = trust accepted trust agreement of June 11, 1914, imposed upon it, acceptant acceptant to said trust it income in a continue or the substitutes therefor so transferred to and held by it under

said Marriage Settlement Agreement and said Agreements of Dacember 2, 1912 and of June 11, 1914, and paid the net income therefrom to the widow of * * * Crane, Sr., quarterly, in accordance therewith, and that up to and until June 2, 1932, the net income so collected and received by The Northern Trust Company as such Trustee from said securities, together with the income from the Atchison Railroad bonds, was sufficient to pay in full said annuity so agreed to be paid to Emily H. Junkin, formerly Emily H. Črane * * *.

"8. The Court further finds that by reason of the premises Charles R. Crane and Richard T. Crane, Jr., during his lifetime, and the Estate of Richard T. Crane, Jr., after his death and until the expiration of the period of one year from the date of Letters Testamentary issued to the Executors of his Will, remained primarily liable to Emily H. Junkin, each for one-half of whatever deficit might arise in the amount due and payable to Emily H. Junkin under and by virtue of said Agreement of December 2, 1912, as modified by said Agreement of June 2, 1922.

"That by reason of the Family Settlement Agreement of
June 11, 1914, and the Trust Agreement therein referred to and bearing
even date therewith, each of the defendants, Kate C. Gartz, Frances
C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane
became severally liable to Emily H. Junkin and to The Northern Trust
Company as Trustee, each for one-seventh of any deficit which might
become due and payable under and by virtue of the terms of said
contract of December 2, 1912, by and between Charles R. Crane and
Richard T. Crane, Jr., and Emily M. Crane, now Emily K. Junkin,
unaffected by the modification of said agreement as between Charles
R. Crane and Richard T. Crane, Jr., pursuant to said Agreement of
June 2, 1922.

"9. The Court further finds that by reason of the passing of its dividend by said Crane Company on March 15, 1932, and thereafter and until December 15, 1937, the income from said securities

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"S. The Court further finds that by reason of the premises Charles R. Creme and Richard E. Creme, Jr., during his lifetime, and the Estate of Richard E. Creme, Jr., after his death and until the expiration of the period of one year from the date of Letters Testamentary issued to the Encenters of his Will, remained primerily liable to Emily M. Junkin, each for one-half of whatever deficit might arise in the amount due and payable to imily M. Junkin under and by virtue of said Agreement of December 2, 1911, as modi-

"9. The Court further finds that by reason of the passing of its dividend by said Crane Company on March 15, 1932, and there-after and until December 15, 1937, the income from said securities

in the hands of he forthern frust Company as such frustee, as aforesaid, together with the income from said bonds of the Auchison * * * Railroad Company, became insufficient to pay said annuity so agreed to be paid to * * * Emily ". Junkin, as aforesaid, in full. That separate accounts were kept by The Forthern Trust Company, as such frustee, as aforesaid, with each of said perties to said frust agreement of June 11, 1914, as therein provided, which said accounts were rendered to each of said parties, quarter-yearly, and that thereafter demand was made by the orthern Trust Company, as such Trustee, upon each of said parties, quarterly, from time to time, for his or her share of such deficit in accordance with the duties imposed upon it by said Agreements. That their obligation to pay their respective shares of such deficit was from time to time fully recognized by each of said parties and full or partial payments were thereafter made by them. That on October 10, 1931, defendant, Late C. Gartz, sold, assigned and transferred to the defendant, A. F. Gartz, Jr., all her right, title and interest, as beneficiary or otherwise, in, to or under said Trust Agreement of June 11, 1914, above mentioned, but that said assignment was made by Mate C. Gartz to .. F. Gartz, Jr., as Trustee, and was not intended to and did not impose upon him, A. F. Gartz, Jr., any personal obligation to make the payments in and by said Family Settlement Agreement assumed by Kate C. Gartz, but that Kate C. Kartz personally and the securities so deposited by her with The Northern Trust Company, as Trustee, remained liable and chargeable with her respective portion of whatever deficit may now exist or may from time to time hereafter arise on account of her agreement to pay such one-seventh share of any such deficit as aforesaid, as in said Family settlement Agreement * * * provided.

"The Court further finds that Emily C. Chadbourne has likewise fully recognized her obligation to pay one-seventh of any such
deficit upon the basis hereinbefore stated, and that by virtue thereof
she likewise is personally liable and the securities deposited by
her with said Trustee are chargeable with her share of such deficit,

is the bends of the Routhern Irust Sagasty or such inurses as eforeseld, together with the income from said bounds of the stableom * * Kallroad Company, became throatisions to pay said namely so agreed to be paid to * * * Maily A. Jankin, as aloressid, in fell. mis duriff granical toll pl. light rate administra \$455000 July cuch Transaction with each of seid perites to said frust 1910, as therein y ovided, thick and accounts were readered to each of said parties, quarter-practic, each thank thereafter demand was made by line orthogon Trust Corpony, as much Trustee, apon each of said parties, our terly, from time to time, for become using the commence of the transfer and the transfer and the state of the sta -or minist yes or melicalities that that almost a bis yet it more Loringo of such deficie was fire to to the for the to sorniz outpogs goshungerid oran comencyay failtang to first has selfung bise. To does ye safe, by Vest, Bart, an Scheler, 15; 15(1), becoming filly in States ils . at transferred to the defendant, i. F. carte, it. i. sold, her right, title and interest, as beerlainty or otherwise, in, to and the total descent of dans to disconstant disc robust was made by fate C. darts to A. F. Gerta, Jr., and more expert for bib best of bebutte to no and bee estart as one at element of the or motivative fatoring the very back to be by mid fadily detries of the course to serve the but that the Mate C. Martz personally and the securities so deposited by her with the forthern fract Coupany, as Franker, remitted Michie and Carrys-Jeine won you theired revelent to active eviteegeer and did elds promoting that he depended on this tellment and are not need that the as aliacorola as ficifed doug yma lo orana dinevos-and inbankyon " " " removers reconstruction of the bloom

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wise fully recognized her obligation to pay one-seventh of any such deficit upon the mais hereinhelore stated, and that by virtue thereoff she likewise is personally liable and the securities deposited by her with said frustee are chargeable with her share of such deficit,

if any, as may now exist, and of such deficit, if any, as may hereafter from time to time during the lifetime of banily N. Junkin arise and become due and payable to her.

Richard T. Crane, Jr. died testate, and on January 20, 1932, his Will was admitted to probate in the Probate Court of Cook County, Illinois, and Letters Testamentary were issued thereon to Cornelius Crane, John K. Prentice, Walter Evensen, and the Continental Illinois Bank and Trust Company as Executors thereof; that thereafter the said Walter Evensen resigned as such co-executor; that no successor to him as such co-executor has been appointed, and that the said Cornelius Crane, John K. Prentice, and said Continental Illinois Bank and Trust Company accepted their appointment and have since acted as such Executors of the mill of Richard T. Crane, Jr.

the deficit in the amount due to Emily M. Junkin under the contract of December 2, 1912, and said Supplemental Contract of June 2, 1922, with Charles R. Crane and Richard T. Crane, Jr., as aforesaid, as shown by the accounts rendered by The Northern Trust Company as Trustee, amounted to the sum of \$14,262.53 for one-half of which, viz., \$7,137.27, a claim was filed by or by the direction of The Northern Trust Company, as Trustee, in the name of Emily H. Junkin, against the Estate of Richard T. Crane, Jr., in the said Probate Court. That thereafter and before the expiration of the period of administration of said estate of Richard T. Crane, Jr., * * * the same was paid in full, one-seventh thereof by said Executors of the Will of Richard T. Crane, Jr. and the remaining six-sevenths thereof from payments made by the other parties to said Family Settlement Agreement, or some of them, in accordance therewith.

"12. The Court further finds that under and by virtue of said contract hereinabove referred to as the Family settlement Agreement * * * and the Trust Agreement bearing even date therewith, so made and entered into with The Northern Trust Company, as Trustee,

if any, as may now exist, one of much wellelt, if any, as may hereafter from time to time during the lifetime of daily A. Juddin arise and become due and payable to her.

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"No. The Court further finds that on hevenber 7, 1931, Michard I. Crane, dr. died testate, and on January Sc. 1932, his will was admitted to probate in the Probate Court of Cook County.

Crane, John K. Prentice, Malter Sysman, and the Continental Illinois Bent and Trust Company as Exempen; that Sheresiter the Said Welter Evensen resigned as such to-executor; that me such co-executor has been appointed, and that the said to him as such co-executor has been appointed, and that the said Cornelius Crane, John M. Frentice, and said Continental Illinois Bent and Trust Company screpted thair appointment and here since acted as such Executors of the Hill of Adment M. Crane, fr.

"II. The Court further finds that on December 2, 1932, the deficit in the emount due to Mmily 2. Sankin under the contract of December 2, 1912, and said supplemental Contract of Suce 2, 1922, with Charles M. Crane and Richard T. Crane, St., as shoren by the accounts rendered by The Morthern Trust Company as frustee, amounted to the sum of \$14,262.53 for one-half of which, vis., \$7,137.27, a claim was filed by or by the direction of The Morthern Trust Company, as Trustee, in the name of Mmily H. Junkin, against the Ustate of Michard T. Crane, St., in the said Probate Court. That thereafter said before the explantion of the period of administration of said estate of Michard T. Crane, St., * * * the same was paid in full, one-seventh thoracf by said Ensurers of the Same Payments made by the other parties to said Samily Settlement from payments made by the other parties to said Family Settlement

"12. The Court further rinds that under and by virtue of said contract hereinabove referred to as the Family Wettlement Agreement * * * and the Trust Agreement bearing even dete therewith; so made and entered into with The Worthern Trust Company, as Trustee,

both Emily H. Junkin, for whose benefit said contracts were made, and The Northern Trust Company, as frustee, became and were severally entitled to enforce the obligations in and by said agreements assumed by the several parties thereto, and that it thereupon became and was the duty of The Northern Trust Company, as Trustee, to enforce the respective obligations of the parties to said respective agreements.

"13. * * * [In paragraph 13 the court makes findings in reference to certain proceedings in the Probate court of Cook county in the matter of the estate of Richard T. Crane, Jr.]

"14. The Court further finds that the jurisdiction of the said Probate Court in the Matter of the Estate of Richard T. Crane, Jr., is limited and inadequate for the adjustment and enforcement of the equities of the several parties in interest herein, and especially to make suitable and adequate provision with respect to future deficits, if any, under said contract of December 2, 1912, and said Supplemental Agreement of June 2, 1922, as the same may hereafter arise; that no action has been taken in. nor order entered by said Probate Court in the Matter of said Petition so filed therein by * * * Emily H. Junkin nor upon the said claim of Charles R. Crane, hereinabove mentioned and referred to; that the power and jurisdiction of said Probate Court to establish a lien upon said 1,000 shares of stock of said Crane Company, which by the terms of the Will of Richard T. Crane, Jr., were bequeathed to Merbert P. Crane as a director of said Crane Company, or to control or dispose of the same pending the determination of the liability of Merbert P. Crane to the Estate of said Decedent growing out of the assumption by him of a portion of said alleged liability to Emily H. Junkin, is also doubtful and inadequate for the proper determination of the rights of the respective parties to such controversy, and that by reason thereof said plaintiffs properly filed in this Court their said complaint, and said distributees of the Estate of said Richard T. Crane, Jr., properly filed their counterclaim herein, for the purpose of having the rights and equities of the several parties

both Waily N. Junkin, for whose benefit said contracts were made, and The Northern Trust Company, as Irustee, became and were severally entitled to enforce the obligations in and by said agreements assumed by the several parties thereto, and that it thereupon became and was need duty of The Morthern Trust Company, as Trustee, to enforce the respective obligations of the parties to said respective agreements.

"13. * * * [In paragraph 13 the court makes findings in reference to certain proceedings in the Probets court of Cook county in the matter of the estate of Richard T. Crame, 5r.]

The Court further fluds that the jurisdiction of the said Probate Court in the Matter of the Matate of Michael C. Crane, Ir., is limited and inadequate for the adjustment and enforcehas altred jeerstai at asitred farevez out to asitiupe out to tasm of joegeer dilw molaiverg staupeds bue eldeline sale of yllaiseque future deficits, if any, under said contract of Decumber 2, 1912, and said Supplemental Agreement of June 2, 1921, as the same may hereafter arise; that no action has been taken in, nor order entered misreal ball? os moitifed hims to reffel ent in true condition hims w by * * * Buily M. Junkin nor upon the said claim of Charles H. Crane, hereinabove mentioned and referred to; that the power and jurisdiction of said Probate Court to establish a lien upon said 1,000 shares of stock of seid Crane Company, which by the terms of the Will of Bickerd T. Crane, Jr., were bequesthed to Hirbert P. Crame as a director of said Crame Company, or to control or dispose of the same pending the determination of the liability of Marbert F. Crane to the Estate of said Decedent growing out of the assumption at animus a portion of stateful landing to making a forming to said to meligantared by regord out to a stampohent has full duob cale rights of the respective parties to such controversy, and that by rieds study and the transport of the court their said complaint, and said distributees of the Estate of said Michard T. Crass, IV., respectly filled their complementate berein, for the soliting Israves out to seltinge has singly and galved to exoque

in interest herein properly and fully adjudicated and enforced.

"15. The Court further finds that on December 2, 1937, the amount of the deficit payable to Bmily h. Junkin under said Contract of December 2, 1912, and said Supplemental Agreement of June 2, 1922, was the sum of 483,897.01 exclusive of Atlorney's fees, costs and expenses incurred by said Trustee in connection with the filing of said claim and the petition in the name and on behalf of Emily H. Junkin, as aforesaid, and in this proceeding, and exclusive of any additional compensation to said Trustee for its services, for one-half of which sum, together with such attorney's fees, costs and additional compensation to said Trustee, Charles R. Crane became and is primarily liable, and for the other half of which the said distributees of the Estate of Michard T. Crane, Jr., became and are primarily liable to the extent of the assets of said estate so received by them, respectively, as aforesaid; that under and in pursuance of said Family Settlement Agreement and said Trust Agreement of June 11, 1914, the said distributees of the Estate of Richard T. Crane, Jr., became in equity liable as between themselves and Charles R. Crane for six-sevenths of such deficit; that the shares of such deficit for which defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, and Herbert P. Crane, respectively, became and were liable, were as follows, viz .:

Kate C.	Gartz\$23,688.04
Frances	C. Lillie 2.916.64
Mary C.	Russell
Emily C	. Chadbourne
Herbert	P. Crane

making said total deficit the sum of\$88,397.01

"That said Frances C. Lillie, Mary C. Nussell and Emily C. Chadbourne have each paid their respective shares of said deficit in full, exclusive of the additional compensation to said Trustee, and of the legal costs and attorney's fees incurred by said Trustee, as hereinafter stated.

"That the share of said deficit so due on December 2, 1937, and remaining unpaid, for which Kate C. Gartz was then liable, is the

in interest herein properly and fully acquisered and enforced.

alf. The Court further finds this on a cocher 2, 1929. the enount of the deficit payable to failly it, during mader said to Junuary, fetueselegal bim bus , 191, 1 reduced to Jostface, June 2, 1922, was the sun of \$33,897.016 exclasive of Atverney's moisseemes at setsent these of bequest useneque has estee, asel and the course and and another your part him which to make it will see you behalf of iznily H. Junin, as storestid, and in this prosecting, and exclusive of any additional compensation to seld trustee for its services, for one-half of which sum, together with such actorney's foes, costs and additional compensation to said fractes, Charles M. Grane become and is primerly liable, and for the other half of which the said distributess of the Matate of Michard I. Orine, Jr., became and are primarily liable to the extent of the escets of sid estate so received by them, respectively, as eversain; that under fourt bire has themesta translated vilmed bise to sensuring of bas Agreement of June 11, 1914, the sold distributes of the Estate of Richard T. Crane, Jr., because in equity liable as between themselves and Charles R. Crame for six-sevenths of such deficit; that the wheres of such deficit for which defendents, date C. Carta, Frances of divined her a proposition of the proposition of the part of the Grame, respectively, became and were liable, were as follows, vis.:

for the state of the said of t

"That said Frances C. Lillie, Lary C. Museell and Mully C. Museell and Mully C. Muse have each paid their respective shares of said deficit in full, exclusive of the additional compensation to said Trastee, and of the legal costs and attorney's fees incurred by said Trastee, as

"Trust the slure of said deficit so due on December 2, 1937, and remaining unpaid, for which Mate C. Garts was then Liable, is the

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sum/\$23,688.04 as aforesaid. That said Trustee has since collected from dividends received by it on the stock of Crane Company deposited with said Trustee by Kate C. Gartz and now held by it as provided by said Family Settlement agreement of June 11, 1914, and the Trust Agreement of same date, hereinbefore mentioned and referred to as Exhibit E, the sum of \$13,536.56, which has been applied in reduction of the said sum of \$23,638.04 so due from said Kate C. Gartz, leaving a balance of \$5,151.48 still remaining due from her as of said December 2, 1937, in addition to her one-seventh share of the additional compensation to said Trustee and its legal costs and attorney's fees, as hereinafter stated.

"# * That said trustee has since collected from dividends received by it on the stock of Crane Company deposited with said Trustee by Herbert P. Crane and now held by it as provided by said Pamily Settlement Agreement of June 11, 1914, and the Trust Agreement of same date, hereinbefore mentioned and referred to as Exhibit E, the sum of \$18,536.57, which has been applied in reduction of the said sum of \$44,604.77, so due from Herbert P. Crane, leaving a balance of \$26,068.20 still remaining due from him as of December 2, 1937, for which sum, together with one-seventh of the additional compensation hereinafter found due and payable to The Northern Trust Company, as Trustee, and its legal costs and Attorney's fees, said plaintiffs are entitled to a decree and judgment as at law against defendant Herbert P. Crane.

and by reason of the deficits so accruing, as aforesaid, and by reason of the death of Richard T. Crane, Jr., The Northern Trust Company, as Trustee, as aforesaid, became and was obliged to perform additional services not contemplated by the parties thereto at the time that said Agreement of December 2, 1912, and said Family Settlement Agreement of June 11, 1914, were made and entered into, and that said Trustee is entitled to additional compensation for such services, which the Court finds to be the sum of \$3,250, being at the rate of \$500 per

smo(23, 283.04 as aforecald. That srid druster has since collected from dividends retained by it on the stock of Orane Joupany deposited with said Trustee by Note C. Stris and sould by it as provided by said Family Settlement Agreement of June 11, 1914, and the Trust Lagreement of same date, hereinhefore mentioned and refaired to as labibit B, the same of \$18,556.55, which has been applied in reduction of the said sam of \$23,655.04 so due from said hate C. Carta, Leaving a belance of \$5,151.48 still remaining due from here as of said secrebor 2, 1937, in addition to her one-seventh share of the additional compensation to said frustee and its legal costs and ittorney's fees, as

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received by it on the stock of Crene Company deposited with said

Trustee by Merbert P. Crane and now held by it as provided by said

Family Settlement Agreement of June 11, 1914, and the trust Agreement
of same date, hereinbefore montioned and referred to as inhibit I,
the sum of \$15,536.57, which has been applied in reduction of the
said sum of \$44,604.77; so due from Herbert P. Crene, leaving a
balance of \$26,063.50 still resaining due from him as of becember 2,
1937, for which sum, together with one-seventh of the additional
compensation hereinafter found due and payable to the additional
Company, as Trustee, and its legal costs and attorney's fees, said
plaintiffs are entitled to a decree and judgment as at law against

"No. The Court further finds that by resson of the promises and by reason of the deficits so secrutars, as aforesaid, and by reason of the deficits so secrutars, as aforesaid, became and was obliged to perform additional services not contemplated by the parties thereto at the time that said Agreement of December 2, 1912, and said Family Settlement Agreement of december 2, 1912, and said Family Settlement Agreement december 2, 1912, and said Family Settlement Agreement of december 2, 1912, and said Family Settlement Agreement december 2, 1912, and said Family Settlement december 2, 1912, and said Family Settlement december 2, 1912, and said Family Settlement december 2, 1912, and said Theorement december 2,

year for the period from December 2, 1931 to June 2, 1938; that said Trustee was also obliged to employ and did employ counsel to advise it with respect to its duties as such Trustee in connection with the enforcement of the several obligations of the several parties to said contracts during the same period, and that said Trustee is entitled to be compensated for the reasonable fees of counsel so employed by it for the purpose aforesaid, which the Court finds to be the sum of \$8,500, which said additional compensation of said Trustee, together with its legal costs herein, amounting to the sum of \$42.49, and attorney's fees, as aforesaid, constitute a proper charge upon the trust funds so held by said Trustee as aforesaid.

"17. The Court further finds that by reason of the premises, as hereinabove stated and set forth, it became and was necessary for said defendants, Cornelius Crane, John K. Prentice, Charles G. King, William R. Odell, and Continental Illinois National Bank and Trust Company of Chicago, and Florence H. Crane, as distributees of the Estate of Richard T. Crane, Jr., and also for defendant, Charles R. Crane, to file herein their counterclaims against the other parties to said Agreement of June 11, 1914, for the purpose of determining their liabilities, respectively, as between themselves, in accordance with the provisions of said contracts of December 2, 1912, and June 11, 1914, and said Supplemental Agreement of June 2, 1922, and that said counterclaims were properly so filed, and should be sustained.

"18. The Court further finds that said distributees of the Estate of Richard T. Crane, Jr., are entitled to a decree herein directing the payment by said defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Amily C. Chadbourne and Merbert P. Crane, respectively, of their respective shares of the existing deficit so far as their said shares have not heretofore been paid by them, together with their respective one-seventh shares of all deficits which may hereafter, during the lifetime of Emily H. Junkin, become due and payable, for the six-sevenths of which said distributees are

year for the period from Secomber 2, 1971 to June 2, 1933; that said Tractes was also obliged to employ and did employ councel to advise it with respect to its duties as such Tractes in connection with the enforcement of the several obligations of the several parties to said contracts during the same period, and that said frustes is entitled to be compared for the responsible fees of councel so employed by it for the purpose aforestis, which the Court finds to be the sum of 48,900, which acid well-ional compensation of said Trustes, together with its legal costs herein, emounting to the sum of 342,49, and Alterray's fees, as eforestid, constitute a proper sum of 342,49, and Alterray's fees, as eforestid, constitute a proper charge upon the trust funds so held by said Trustee as aforestid.

"I7. The Court further finds that by reson of the primises, as hereinabove stated and set forth, it became and was necessary for said defendants, Cornelius Grane, John M. Frentice, Charles G. Ming, Company of Chicago, and Florence E. Crane, as distributees of the Estate of Richard T. Crane, Jr., and also for defendant, Charles M. Crane, to file herein their counterclaims against the other parties to said Agreement of June 11, 1914, for the purpose of determining their liabilities, respectively, as between themselves, in accordance with the provisions of said contracts of December 2, 1912, and June 11, 1914, and said Supplemental Agreement of June 2, 1922, and June 11, 1914, and said Supplemental Agreement of June 2, 1922, and that said counterclaims were properly so filed, and should be sustained.

"18. The Court further finds that said distributees of the Estate of Richard W. Grame, Jr., are entitled to a decree herein direction of their respective shares of the existing deficit so far as their said shares have not heretofers been paid by tham, to-ray hereafter, during the lifetime of baily W. Junkin, become due and payable, for the ein-seventhe of which said distributees are

primarily liable as aforesaid, as between themselves and defendant, Charles R. Crane, who is liable as between himself and Imily J.

Junkin and The Northern Trust Company, as Trustee, for one-half of such deficits, but who is liable, as between himself and said distributees for only one-seventh of such deficits. That Charles R.

Crane is entitled to the order and decree of this court requiring said distributees and Kate C. Gartz, Frances C. Lillie, Emily C.

Chadbourne, Mary C. Russell, and Merbert P. Crane to pay and satisfy, to the extent they are respectively liable therefor, any and all deficits now existing or hereafter arising, other than the one-seventh part thereof, for which Charles R. Crane has remained liable under said Family Settlement Agreement and other agreements, in exoneration of the liability of Charles R. Crane to Emily J. Junkin under and by virtue of said Agreement of December 2, 1912.

"19. The Court finds that Frances C. Lillie, Mary C. Russell and Amily . Chadbourne have never denied their liabilities under the contracts hereinbefore mentioned or refused to pay their respective shares of the amounts due or payable to or for Bmily H. Junkin, nor has any of them ever claimed to be entitled to any reduction in amount of their respective liabilities by reason of said contract of June 2, 1922, which reduced the amount to be paid to Smily H. Junkin from \$100,000 per year to \$35,000 per year, nor prior to the beginning of this suit had there been any controversy between plaintiffs and Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne, except Frances C. Lillie's objection to attorneys' fees of plaintiffs; that, from time to time, when they were notified of the respective amounts due from or payable by them respectively, Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne, with reasonable promptness, always paid the amounts due from or payable by them respectively, that they owe no part of said sum of \$88,897.01 of deficit due December 2, 1937; that up to and including June 2, 1938, they have paid in full all sums claimed from them, except

primarily liable as aforesaid, as between biasasives and defendant, Charles R. Creme, who is liable as between biasass, for one-dair of Junkin and The Forthern trust Company, as frustes, for one-dair of such deficits, but who is liable, as between himself and said distributees for only one-seventh of such deficits. That Charles A. Creme is entitled to the order and decree of this court reculring said distributees and Rate C. darts, Frances C. Lillie, Ently C. Chadbourne, Mary C. Russell, and Herbert F. Creme to pay and asiafly, to the entent they are respectively liable therefor, any and all deficits now existing or hereafter arising, other than the one-reventh said Family Settlement Agreement and other (greenents, in exercition of the liability of Charles R. Crame to Emily A. Junkin under end by virtue of said Agreement of December 2, 1912.

The Toronto Make their Present Pulling Story S. Russell and Maily U. Chadbourne have never denied that I tabilities under the contracts hereinbefore mentioned or refused to pay their .N ylimily to a of old year of the excusts die or payable to or limily M. Junkin, nor has any of them ever claimed to be entitled To notice yd salfilidell sylfocyter then! To famous at noliquber bing ed of June 2, 1922, which reduced the amount of June paid to Baily H. Junkin from \$100,000 per year to \$35,000 per year, nor prior to the beginning of this sait had there been any controversy between plaintiffs and Frances C. Lillie, Mary C. Mussell and Maily C. Chadbourne, except Frances C. Lillie's objection to attorneys! focu of plaintiffs; that, from time to time, when they were notified of the respective amounts due from or payable by them respectively, District to billing may be dissent and make to the mountage at the reasonable promptuess, always paid the amounts due from or payable to the every strain, the larger on pert of seld des of 125,197,401 of deficit due December 2, 1937; that up to and including June 2, 1935, terr may puls in Chil all some oldered from the speciality

amount claimed for atvormeys' fees of plaintiffs and amount claimed for 'additional compensation' of the Morthern Trust Company for services in the matter of collecting from members of the Crane family for Emily H. Junkin sums of money not derived from the trust funds held by The Northern Trust Company as Trustee; that the statement of account of The Northern Trust Company heretofore filed herein shows all shares of deficits to June, 1938, that were at any time due or owing from defendants, Frances C. Lillie, Mary C. Russell or Emily C. Chadbourne, were paid in full and that The Northern Trust Company then held in account to credit of

\$31,683.69

"The Court finds that The Northern Trust Company has already received and taken for fees for its services in the matter of payments to Emily H. Junkin under the provisions of the contracts herein mentioned, two and one-half per cent. of the amounts received from interest derived from the Union Pacific Bonds and the dividends from Pullman Company stock held in the principal accounts, and one per cent, of the dividends from the Crane Company stock held in the several trusts of Frances C. Lillie, Mary C. Russell, Bmily C. Chadbourne, Kate C. Gartz and Herbert P. Crane, and in addition such sums as were paid by Charles R. Crane, Richard T. Crane, Jr., and the distributees of the estate of Richard T. Crane. Jr., deceased. for fees, and these fees for the whole period amount to the sum of \$34,312.81; that defendants, Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne, each has already contributed to the fees of The Morthern Trust Company from December 2, 1919, to June 2, 1938, the sum of \$5,298.51; that Frances C. Lillie has from the beginning protested against the payment of attorneys' fees of plaintiffs and that Frances C. Lillie and Mary C. Russell have from the beginning of this suit protested against paying to The Morthern Trust Company Trustee's fees or attorneys' fees for filing or litigating claim against the

with a series

ename element for atterneys' form of the Aerthern Trust Company elamed for 'additional componention' of the Aerthern Trust Company for services in the matter of callecting from members of the Grand family for Emily M. Judkla sums of money not derived from the trust family for Emily M. Judkla sums of money not derived from the trust famile held by The Northern Trust Company as Iruatees; that the state-horein shows all shares of deficits to June, 1938, that were at any time due or owing from defendants, Frances C. Lillie, Lary C. Mussell or Emily C. Chadbourne, were paid in full and that The Northern Trust Company then held in account to credit of

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and yauguou faurt arestrou off fact abath truck on The astign off at assives att tof seet tot astal bus bevissor ybearls of payments to indir H. Junkin under the provisions of the contracts herein mentioned, two and one-half per cent, of the emounts received abnobivib and bas abade pities round and mort bevireb derestat mort from Pallman Company stock held in the grincipal accounts, and one per cent, of the dividends from the Crane Company stock held in the several tracts of Frances C. Hillis, Hary C. Russell, Enlly C. Chadbourne; Kate C. Cartz and Herbert P. Crane, and in addition swon sums as were paid by Charles A. Crane, Richard T. Crane, Jr., and the distributees of the estate of Michard T. Crane, Jr., decessed, To me ody of Juness being glodw ont not seel seent bus 2001 101 \$34,312.81; that defendants, Frances C. Lillie, Mary C. Mussell and Emily C. Chadbourne, E. L. L. L. Contributed to the contribute of The March Truck Charge of the section of 1918 to the Paris of the Contract of ods of 99290.32; dut traces C. Litzis as from the section, protest bas affithing to assi 'avenuet' is and the better Frances C. Lillie and Mary C. Russell have from the beginning of this sait protested against paying to The Morthern Trust Company Trustee's fees or attorneys' fees for filling or litigating claim against the estate of Richard T. Crane, Jr., deceased, or for livigating controversies with the distributees of the estate of Richard T. Crane, Jr., deceased, or for litigating controversies with Herbert P. Crane, Kate C. Gartz, or A. F. Gartz, Jr., Trustee, or for any services, except services with reference to the property held by The Northern Trust Company, as Trustee.

"20. The Court further finds that by order of this Court entered herein on July 1, 1938, The Northern Trust Company, as
Trustee, was directed and ordered by the court to prepare and file herein its account covering the period from December 2, 1919, to and including July 9, 1938, and that said account was duly prepared and filed by The Northern Trust Company as Trustee, pursuant to said Order.

"21. The Court further finds that it has jurisdiction of the res and that it can control the entire trust funds so deposited with The Northern Trust Company, as Trustee, as hereinbefore stated, both the corpus of said trust funds and the income therefrom, together with the right to direct how the account of said Trustee shall be stated.

"That the Court has the right to take under its control any of the securities that are now in the jurisdiction of the Court, as aforesaid, in order to insure the payment of any existing or future deficits that may hereafter, at any time arise or accrue, on the basis hereinbefore stated, for which any of the parties hereto are now or shall hereafter become liable, regardless of whether personal service has been had herein on any of said defendants."

The decretal part of the decree is as follows:
"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, and the
Court hereby ORDERS, ADJUDGES AND DECREES:

"1. That the motions heretofore filed herein to dismiss
the complaint and amended complaint of plaintiffs and the counterclaims
of Charles R. Crane and of Cornelius Crane, John K. Prentice, Charles
G. King, William R. Odell and Continental Illinois National Bank and
Trust Company of Chicago, Trustees under the Will of Richard T. Crane,
Jr., Deceased, and Florence H. Crane, be and the same are hereby denied.

estate of Richard T. Crane, Ir., deceased, or for hithgring controversies with the distributees of the estate of Alchard I. Grane, Ir., deceased, or for hithgring centroversies with Merbert P. Grane, Late G. Gertz, or A. F. Gertz, Ir., Trustee, or for any services, except services with reference to the property held by The Corthern Trust Company, as Trustee.

"20. The Court further finds that by order of this Court entered herein on July 1, 1930, The Morthern Trust Company, as Trustee, was directed and ordered by the court to propare and file herein its account covering the period from December 2, 1919, to and including July 9, 1932, and that said account was duly propared and filed by The Morthern Trust Company as Trustee, pursuant to said Order.

"21. The Court further finds that it has jurisdiction of the res and that it can control the entire trust funds so deposited with The Northern Trust Company, as Trustee, as hereinbefore stated, both the corpus of said trust funds and the income therefrom, together with the right to direct how the second of said Trustee shall be stated.

"That the Court has the right to take under its centrol any of the unit in the court of the unit in the court of the payent of any existing or future deficits that may hereafter, at any time or secree, on the basis her in or stated, for which any of the parties hereto are now or shall hereafter become liable, regardless of whether personal service has been had herein on any of said defendants."

The decretal part of the decree is as follows:
"IT IS THERWYORK ORDENED, ADJUDGED AND DECREED, and the

"I. That the motions heretofore filed herein to dismiss
the ousplaint and arould equicient of pickwifes and the conversation
of Charles 4. Crams and of dorwellow Grams, John E. Prantice, Charles
0. King, william 4. Cools and Continents Illinois = Hones Enchand
Crust Company of Chicago, Trusters under the file of Hebert 5. Crams,
Or., Deserand, and flor and d. Crams, is and the more are hereby denied.

- "2. That the guarterly accounts received in evidence heretofore rendered and stated by The Northern Trust Company, as Truster,
 as aforesaid, to the several defendants with respect to the income
 received from the securities held by said Trustee, and the application
 of said income, as provided by the several agreements hereinbefore mentioned and referred to, be and the same are hereby approved.
- "3. That all objections to the account heretofore filed herein by The Northern Trust Company as Trustee, be and the same are hereby overruled and said account be and the same is hereby approved.
- with the defendants to said complaint, other than the Executors of the Will of Richard T. Crane, Jr. and A. F. Gartz, Jr., upon the basis hereinbefore stated and approved, with respect to the income from the securities so held by it as aforesaid, including the income from said Atchison bonds, subsequent to December 2, 1937, and to collect and pay over such income to Emily H. Junkin quarterly, as in said Agreement of December 2, 1912 provided, to the extent and amount and at the rate of \$85,000 per annum, during her lifetime, and at the same rate for the portion of any year hereafter, beginning with December 2, 1937, prior to her death; statements of account to be rendered quarterly to each of the parties defendant herein, their legal representatives or assigns.
- Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, Herbert P. Crane, Charles R. Crane and said Cornelius Crane, John K. Prentice, Charles G. King, William R. Odell and Continental Illinois National Bank and Trust Company of Chicago, Trustees under the Will of Richard T. Crane, Jr., Deceased, and Florence H. Crane, distributees of the Estate of said Richard T. Crane, Jr., or their respective heirs, legal representatives or assigns, the several one-seventh shares of any deficit which may exist on any December 2nd of any year for which such defendants are hereinbefore found liable; that Charles R. Crane and said distributees of the Estate of Richard T. Crane, Jr. each be credited by said Trustee upon their primary liability, respectively,

"2. That the guarterly accounts received in evidence heretefore rendered and stated by The Northern Trust Company, as Truster;
as aforesaid, to the several defendents with respect to the income
received from the securities held by said Trustee, and the application
of said income, as provided by the several agreements hereinbefore mentioned and referred to, be and the same are hereby approved.

"3. That all objections to the account heretofore filed herein by The Northern Trust Company as Trustee, be and the same are hereby overruled and said account be such the same is hereby approved.

with the defendants to said complaint, other than the Executors of the Will of Michard T. Crane, dr. and A. F. Gertz, dr., upon the basis hereinbefore stated and approved, with respect to the income from the securities so held by it as aforesaid, including the income from said securities so held by it as aforesaid, including the income from said said over such income to intily N. Junkin quarterly, as in said igreement of December 2, 1912 provided, to the extent and amount and at the rate of \$85,000 per annum, during her lifetime, and at the same rate for the prior to her death; statements of account to be remarked quarterly to prior to her death; statements of account to be remarked quarterly to assigns.

First soid Trustee continue to charge against defendants, kate C. Gartz, Frances C. Lillie, Mary C. Mussell, Mmily C. Chedbourne, Merbert P. Crane, Charles R. Crane and seid Cornelius Crane, John E. Prentice, Charles G. Kirg, Milliam W. Odell and Continental Illineis Wational Rank and Trust Company of Chicago, Trustees under the Will of Kichard T. Crane, Jr., Deceased, and Florence H. Crane, distributees of the Estate of seid Michard T. Crane, Jr., or their respective heirs, legal representatives or as I.m., the several one-seventh shares of any deficit which may exist on any December 2nd of any year for which such defendants are hereinbefore found liable; that Charles R. Crane and defendants are hereinbefore found liable; that Charles R. Crane and defendants are hereinbefore found liable; that Charles R. Crane and

each for one-half of any such deficit, with the several amounts paid by such other defendants last above named, or received by said Trustee as dividends or income from securities by them deposited with or held by said Trustee from time to time, as provided by said Family Settlement Agreement and said Trust Agreement of June 11, 1914. That said Trustee in its accounts so to be hereafter rendered, charge said distributees of the Estate of said Richard T. Crane, Jr. and Charles R. Crane, respectively, with one-seventh of any deficit which may exist on December 2nd of any year from and after the date hereof. on the basis of the net income of \$85,000 per annum, so guaranteed by Charles R. Crane and Richard T. Crane, Jr., severally, one-half by each, under and in accordance with said Agreement of June 2, 1922, and that said Trustee in its said accounts charge Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane each with one-seventh of any such deficit on the basis of the net income of \$100,000 per annum, so guaranteed by Charles R. Crane and Richard T. Crane, Jr., severally, one-half by each, under and in accordance with said Agreement of December 2, 1912.

"That defendants, Kate C. Gartz and Herbert P. Crane, pay
to The Northern Trust Company, as Trustee, their respective portions
of said deficit of \$88,897.01, as hereinbefore determined, not heretofore paid by them, or received by The Northern Trust Company as
Trustee from the dividends from said shares of stock of said Crane
Company so deposited by them respectively as aforesaid, and that
said defendants, Kate C. Gartz, Frances C. Lillie, Mary C.
Russell, Emily C. Chadbourne and Herbert P. Crane, gaid
defendants, from and after the date of the entry of this
decree, pay, each to the extent of one-seventh thereof, any
and all future deficits in satisfaction and discharge of their
respective liabilities to said distributees of the estate of Richard
T. Crane, Jr., to Charles R. Crane, to Emily H. Junkin, and to The
Northern Trust Company, as Trustee, and in exoneration of the liability of said distributees and of Charles R. Crane to Emily H.

oach for one-half of any such deficate, with the several amounts paid by such other defendants last above maned, or received by paid Trusted as dividends or income from securities by them deposited with without bigs yd bekivers as amis to time to trouble by said Trustee Tr Settlement har end said Trust harcement of Jane 11. 1914. That said Trustee in its accounts so to be bereafter rendered, charge said distributees of the Matate of said Michard T. Crone, Jr. and Charles R. Crame, respectively, with one-seventia of any deficit which may endet on December and of any year from and after the date hereof, on the besis of the net income of \$85,000 per amuma, so gastanteed by Charles R. Creme and Richard T. Creme, Jr., severally, one-half by each, under and in accordance with said Arresment of June 2, 1922, and that said Trustee in its said secounts charge Eats 0. Carte, Process 5, Lilits, Mary 5, Proceeding mails 0, Visible one and Herbert P. Crane each with one-seventh of any such deficit on the basis of the net income of \$100,000 per ennum, so guaranteed by Charles R. Grene and Richard T. Grane, Jr., severally, one-half by each, under and in secondance with raid agreement of December 2, 1912.

"That defendants, Nate C. Gartz and Herbert F. Cranc, pay of said deficit of 488,897.01, as hereinhedere determined, not here-tofore paid by them, or received by The Morthern Trust Company as Trustee from the dividends from said shares of stock of said Crana Company so deposited by them respectively as aforesaid, and that said defendants, Nate C. Gartz, Frances C. Lillie, Mary C. Marker, Trom and after the date of the entry of this decree, pay, each to the entent of one-seventh thereof, any cand all future deficits in satisfaction and discharge of their respective libilities to said distributees of the estate of Nichard T. Crane, Jr., to Charles R. Crane, to Emily H. Junkin, and to The orthern fine Captur, a trust of Charles R. Crane to Maily H. Junkin, and to The orthern fine Captur, a trust of Charles R. Crane to Maily H.

Junkin and to The Northern Trust Company, as Trustee, for or on account of such deficits to the extent of five-sevenths thereof, determined as hereinbefore provided, and that, to the extent of the value of the assets of the estate of Richard T. Crane, Jr. received by them, respectively, the said distributees pay to Emily H. Junkin, or to The Northern Trust Company as Trustee, in exoneration of the liability of Charles R. Crane therefor, six-sevenths of said deficit of \$88.897.01. or so much thereof as is not paid by defendants Kate C. Gartz and Herbert P. Crane, or either of them, (Frances C. Lillie, Mary C. Russell, and Bmily C. Chadbourne having heretofore paid their respective portions of said deficit), and that, to the extent of the value of the assets of the estate of Richard T. Crane, Jr. received by them, respectively, said distributees further pay to the extent of six-sevenths thereof any and all future deficits. The foregoing language in Par. 5, shall not be construed to constitute a money judgment against Kate C. Gartz.

"6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED That said sum of \$3,250.00, so hereinbefore found to be due to The Morthern Trust Company, as Trustee, for additional compensation for its services as such Trustee for the period from December 2, 1931 to June 2, 1938, together with its Attorney's fees in the amount of \$8500 for the services of its counsel from December 2, 1931, to the date of entry of this decree, together with its legal costs and expenses to the date of entry of this decree, amounting to the total sum of \$11,792.49, be charged by said Trustee in its said account to be rendered to said several defendants, one-seventh to each of said defendants, Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne, and Herbert P. Crane; one-seventh thereof to be charged to said distributees to the extent of the value of the assets of the estate of Richard T. Crane, Jr. received by them, respectively, and one-seventh thereof to defendant, Charles R. Crane.

"7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, and the Court hereby ORDERS, ADJUDGES AND DECREES, That said plaintiffs have judgment as at law against defendant, Herbert P. Crane, for the sum

Junkin and to The Northern Trust Company, as Trustee, for or on ecount of such deficits to the extent of five-covering thereof, edd to Jastas of the distance provided, and that to the entered as value of the samets of the satete of Michael F. Crane, Ir. received by them, respectively, the said distributees pay to Emily W. Justin, or to The Forthern Trust Company as Trustee, in exonerstien of to lightly of Charles A. Crame therefor, six-sevenths of said deficit of \$33,897.01, or so much thereof as is not paid by defendants Mate C. Carta and Nerbert P. Creno, or sither of them, (Frances C. Lillie, Mary C. Russell, and mully C. Chadbourne having heretofore gaid their odi lo incire odi or itali and the lo and itali o ovijoegrer beviseer .T. . or of the estate of Hicker T. Crane, It. by them, respectively, and distributees further psy to the extent of six-revenits thereof any and all fature deficits. The foregoing language in Fer. 5. simil not be construed to constitute a money - APRIL - SHEET ANALYSIS COMMENT

the remme comme, avenue and more than the

Trust Company, as Trustee, for additional compensation for its services as such Trustee for the period from becember 2, 1951 to June 2, 1953, together with its Attorney's fees in the amount of 83500 for the services of its counsel from becember 2, 1931, to the date of entry of this decree, together with its legal costs and expenses to the date of entry of entry of this decree, amounting to the total sum of 111,792.49, be charged by said Trustee in its said account to be rendered to said deveral defendants, one-seventh to each of said defendants, Kate C. Gertz, Frances C. Lillie, Mary C. Hussell, Emily C. Chadbourne, and derbert F. Crune; one-seventh thereof to be charged to said distributees to the extent of the value of the assets of the estate of Richard T. Crune, Jr. received by them, respectively, and one-seventh thereof to defendant, Charles R. Crane.

"7. IT IS FURTHER ONDERHO, ADJUDGED AND DECREED, and the

of \$27,752.84, together with interest on \$26,063.20 thereof from December 2, 1937 to date of payment, and that plaintiffs have execution therefor.

- unless the respective shares of any existing deficit, computed as hereinbefore stated, of said defendants, or any of them, as of December 2nd, in the year 1937, or any year thereafter, or upon the death of Emily M. Junkin, be paid to or received by said Trustee out of dividends or interest, within sixty days after written notice, from said Trustee of the amount of such deficit, said Trustee, or any party in interest under this decree, be and hereby is authorized to apply to this court for further instructions and directions with respect to the enforcement of the findings of the court herein with respect to the control of said trust funds for the purpose of satisfying the obligations of said defendants, or any of them, with respect to such deficits.
- "9. IT IS FURTHER ORDURED, ADJUDGED AND DECREED That this Court retain jurisdiction of all the parties to this cause of which it now has jurisdiction, as aforesaid, and of the status of all the parties to and the subject matter of this cause, for the purpose of providing further, if necessary, for the execution of this decree and the enforcement of the respective liabilities of the parties hereto and of determining the amount of future deficits, if any, and for the purpose of further directing or providing for the payment thereof by the respective parties hereto and their respective heirs, executors, administrators, legal representatives, successors or assigns, who are hereby or may hereafter be found liable therefor.
- "10. Any application made under the provisions of paragraphs 8 and 9 above may be made by summary petition of the party making such application upon such notice to the remaining parties hereto as the court may from time to time direct.
- "11. That The Northern Trust Company be authorized to apply to this Court from time to time hereafter for instruction and advice in the performance of its duties as such Trustee and that any of the

of \$27,752.84, logether with interest on \$26,063.20 thereof from December 2, 1937 to date of payment, and that plaintiffs have

"8. IT IS FURTHER ORDERING, ADJUDCED AND DECREED That unless the respective chares of any existing deficit, computed as hereinbefore stated, of said defendants, or any of them, as of December 2nd, in the year 1937, or any year thereafter, or upon the death of Maily N. Junkin, be paid to or received by said Trustee out of dividends or interest, within sixty days after written notice; from said Trustee of the amount of such deficit, said Trustee, or any party in interest under this decree, be and hereby is authorized to apply to this court for further instructions and directions with respect to the enforcement of the findings of the court herein with respect to the control of said trust funds for the purpose of satisfying the obligations of said trust funds for the purpose of satisfying the obligations of said defendants, or any of them, with respect

Ourt retain jurisdiction of all the parties to this cause of which it now has jurisdiction, as aforesaid, and of the status of all the parties to and the subject matter of this cause, for the purpose of providing further, if necessary, for the execution of this decree and the enforcement of the respective liabilities of the parties hereto and of determining the amount of future deficits, if any, and for the purpose of further directing or providing for the payment thereof by the respective parties hereto and their respective heirs, executors, layal representatives, successors or assigns, who are ininistrators, legal representatives, successors or assigns, who are thereby or may hereafter be found liable therefor.

"10. Any application made under the provisions of paragraphs 8 and 9 above may be made by summary petition of the party dentity as an application upon such notice to the remaining parties are as an acure were the such acure as a such acure were the such acure as a such acure were the same acure as a such acute as a s

"11. That The Worthern Trust Company be authorized to spily to this Sear from the to the forformence of its duties as such Trustee and that any of the

parties to this cause be likewise authorized to apply to this Court from time to time for instruction and advice as to their respective rights, liabilities or duties by reason of any of the matters herein mentioned or referred to, not herein and hereby adjudicated and determined; and the Court expressly reserves for future determination the question of the rights of said Executors of the will of Richard T. Crane, Jr. and defendant, Merbert P. Crane, respectively, with respect to the disposition of said 1,000 shares of the common stock of Crane Company bequeathed by Richard T. Crane, Jr. to Merbert P. Crane, and by said Executors withheld from distribution in accordance with the Order of the Probate Court of said Cook County, in the Matter of the Estate of Richard T. Crane, Jr., with leave to either of said parties to apply to this Court for further order with respect thereto."

The following is plaintiffs! theory of the case: "As to the distributees of the Estate of Richard T. Crane, Jr., and Charles R. Crane, plaintiffs' theory of the case was that while they remained severally liable, each for one-half of the deficits in Mrs. Junkin's income, The Northern Trust Company as trustee had the right to collect from the various members of the family the amount of the various deficits in Emily H. Junkin's income for which they had respectively assumed liability under the family settlement agreement in the complaint and above referred to; that not only had Richard T. Crane, Jr., and Charles R. Crane assumed a personal liability to Emily H. Junkin for the amount of said deficits, but that under the so-called family settlement agreement, and related documents, the four sisters and brother of Richard T. Crane, Jr., and Charles R. Crane had assumed a personal liability for their respective oneseventh shares of such deficits, and that both Bmily M. Junkin, and The Morthern Trust Company, as trustee, had the right, as third party beneficiary under said agreement, to enforce the liability of said four sisters and brother which they had thus assumed in their contracts with each other, and with their brothers Richard T. Crane, Jr., and Charles R. Crane. Plaintiffs further claimed that the

parties to this cause be likewise authorized to Apriy to this Court from time to time for instruction and Advice as to time; respective rights, liabilities or duties by reason of any of the matters herein mentioned or referred to, not herein and hereby adjudicated and use Court expressly reserves for future determination.

The question of the rights of said Executors of the Will of Michard the question of the disposition of said 1,000 chures of the common stock of the disposition of said 1,000 chures of the common stock of the disposition of said 1,000 chures of the common stock of the disposition of said from distribution in accordance of said parties to apply to this Court for further order with respect thereto."

THE POLLOGISH IN PRINCIPLE THROUGH BY CHROMATON THE TANK the distributees of the Estate of Richard R. Crane, Jr., and Charles R. Crene, plaintiffs' theory of the east was that while they remained severally liable, each for one-helf of the deficits in krs. Junkin's income, The Morthern Mrust Company as trusted had the right and to Juneau ord vitual and to erection authorized of the called of various deficits in Emily H. Junkin's income for which they had respectively manufactured the bally manufactured to the manufactur in the complaint and above referred to: that not only had Kichard The second of th willy it. Sunday for the opened of well definite, but not well the the four sisters and brother of Richard P. Creme, Fr., and Charles B. Orane had assumed a personal liability for their respective oneseventh shares of such deficits, and that both Bally M. Junicin, and the forthern trace formerly as traces, not no state, as taken to villight, and e said agreement, to enforce the lightlity of ried ni berusas and bad yell deline redford bas arefala quel blas contracts with such ower, but him their norther size with many We and Charles a. On re. Its indicts too less on the the the reduction in Emily M. Junkin's guaranteed income from \$100,000 to \$85,000 inured solely to the benefit of Richard T. Crane, Jr., and Charles R. Crane and that the liabilities of the four sisters and brother should therefore be determined upon the basis of a guaranteed income to Emily M. Junkin of \$100,000, and not upon the basis of a guaranteed income of \$85,000 upon the basis of which the liability of Richard T. Crane, Jr., and Charles R. Crane was to be determined. Plaintiffs further claimed that A. F. Gartz, Jr., as assignee of Kate C. Gartz, was obligated for Kate C. Gartz' share of the deficits."

The following is the counterclaimants! theory of the case: "The counterclaimants, Charles R. Crane and the distributees of the estate of Richard T. Crane, Jr., deceased, claimed that while Charles R. Crane and Richard T. Crane, Jr., had assumed a personal liability to Emily H. Junkin for any deficit in the amount of her guaranteed income - each for one-half thereof - nevertheless under and by virtue of the family settlement agreement and related documents Richard T. Crane, Jr. (and to the extent of the value of the assets of his estate received by them, the distributees of his estate) were obligated, as between Richard T. Crane, Jr., and Charles R. Crane, for six-sevenths of the entire amount of such deficits, and also that as between Charles R. Crane and Richard T. Crane, Jr. (and the distributees of his estate) on the one hand, and their four sisters and brother on the other hand, said four sisters and brother had assumed five-sevenths of the liability for such deficits (each severally to the extent of one-seventh thereof). Counterclaimants further claimed that therefore, as between them on the one hand and their four sisters and brother on the other hand, the primary liability for five-sevenths of the liability for said deficits rested upon the four sisters and brother (severally to the extent of one-seventh each), and that they had the right to compel the said four sisters and brother to perform their respective obligations to Emily H. Junkin in exoneration of the liability which Charles R. Crane and Richard T. Crane, Jr., had initially assumed to the said Dmily H. Junkin. Both plaintiffs and counterclaimants

reduction in Imily W. Junkin's guaranteed income from \$100,000 to \$85,000 inured solely to the benefit of Micherd T. Crane, Jr., and Charles R. Crane and that the Habilities of the four sisters and brother should therefore be determined upon the basis of a guaranteed income to Maily W. Junkin of \$100,000, and not upon the basis of a guaranteed income of \$85,000 upon the basis of which the Hability of Michard T. Crane, Jr., and Charles W. Crane was to be determined. Plaintiffs further claimed that A. F. Gertz, Jr., as sasignee of Mate C. Gertz, was obligated for Mate C. Gertz, Jr., as sasignee of Mate C. Gertz, was obligated for Mate C. Gertz, Jr., as sasignee of Mate C. Gertz, was obligated for Mate C. Gertz, Juare of the deficits."

The following is the counterelaments, theory of the case: "The counterclaiments, Charles R. Crane and the distributees of the estate of Richard T. Crane, Jr., deceased, claimed that while Charles I. Creme and Milhard T. Crame, dr., and exemped a personni Hamilier basing and lo impose the table of the remain of her guaranteed the search for consolid the real - revision and all the search the search the search that the .T brade it softeness to be seen acrossor to select the and to drame, it. (and up at the extent of the Tollar and to contract out of the it. received by them, the distributees of his estate) were obligated, as between Richard T. Crame, Jr., and Charles M. Crame, for six-sevenths of the entire amount of such deficits, and also that as between Charles R. Creme and Richard T. Creme, Jr. (and the distributees of his estate) shand readto and no restord has anotate rues rient bas based one and an -all all to solution will commune and restore age aredain upon blue bility for such deficits (each severally to the extent of cone-severith meewied as genelated that them also reinsured that therefore, as meewied as genelated that the meewing the state of the st them on the one hand their four sisters and brother on the other and, the primary liability for five-seventh of the liability for said deficits rested upon the four sisters and brother (severally to the extent of one-seventh each), and that they had the right to compel -ifuo evidence ried brother to perform their respective other gations to Hally H. Junkin in exoneration of the liability which Charles R. Grane and Richard T. Crane, Jr., had initially assumed to the said Baily H. Jankin. toth plaintiff's and sounters humbs

[italics ours] claimed that it was not necessary in order that the liability of the four sisters and brother be enforced that the deficits be first paid to Emily H. Junkin either by Charles R. Crane or by the distributees of the estate of Richard T. Crane, Jr., deceased; that all of the parties in interest having been brought before the court in this action the court had full jurisdiction to determine and adjudicate their respective obligations herein. Both plaintiffs and counterclaimants [italics ours] claimed that the reduction in the guaranteed income of Buily H. Junkin from \$100.000 to \$85,000 inured solely to the benefit of Charles R. Crane and Richard T. Crane. Jr. and his distributees (to the extent of one-half each) and that the respective liabilities of the four sisters and brother should be enforced upon the basis of a guaranteed income of the full sum of \$100,000. Both plaintiffs and cross complainants [italics ours] also claimed that the jurisdiction of the Probate Court of Cook County in which the administration of the estate of Richard T. Crane, Jr., was pending at the time of the filing of the complaint, was inadequate for the determination and adjustment of the rights and interests of the several parties to this action, and that, therefore, it became and was hecessary to invoke the jurisdiction of a court of equity for that purpose."

The appellants state their defense as follows:

- "(1) No personal obligation is imposed upon any members of the Crane family, other than Charles R. Crane and Richard T. Crane, Jr., to pay any deficits occurring in the annuity funds for Emily H. Junkin under either
 - "(a) the agreement of June 2, 1912 * * *;
 - "(b) the agreement of June 11, 1914 * * *;
 - "(c) the addendum to said agreement of June 11, 1914, or Exhibit 'E' referred to in said agreement; or
 - "(d) the agreement of June 2, 1922, * * * by which the annuity for Emily H. Junkin was reduced to \$85,000;
 - "(2) that, by the execution of the addendum * * * the

fadt tebuo of yrasesen for ser if tedt bemisis [armo seilati] the limity of the four sizters and brother se forced that the deficits be first paid to Emily M. Junian either by Charles R. Crame or by the distributees of the estate of Richard T. Crame, ased gaived freezent at asiring sat to ila teat ; beceased .. T. brought before the court in this action the court had furifur diction to determine and adjudicate their respective obligations Sendals (very satisfit) shows for found and all mission and anterest that the reduction in the sourambeed income of mails a comits from \$100,000 to \$85,000 immred solely to the benefit of Charles R. Grame and Richard T. Crane, Jr., and his distributees (to the extent of one-half each) and that the respective liabilities of the four sisters and brother should be enforced upon the basis of a guaranteed account of the state of the second to an in the second to mind the third that the ball (and milet) grantafanos the Probate Court of Cook County in which the administration of end to eait out is guidance see . To . one of Bredelf to estate end filling of the complaint, was inadequate for the determination and of selfued fareves suit to sisseraint has eligit out to inomization of the section, and that, therefore, it became and was that invoke the jurisdiction of a court of equity for that purpose."

The appellants state their defense as follows:

"(1) No personal obligation is imposed upon any members of the Grane family, other than Cherles R. Grane and Richard P. Grane, Jr., to pay any deficits occurring in the annuity funds for

[&]quot;(a) the agreement of June 2, 1912 * * *;

[&]quot;(b) the agreement of June 11, 1914 * * *;

[&]quot;(c) the addendum to said agreement of June 11, 1914, or

[&]quot;(2) that, by the execution of the addendum * * * the

other members of the Crane family did not assume or become bound by the terms of said agreement of June 11, 1914, except for the limited purposes specifically set forth in said addendum and Exhibit 'E'; the limited purposes specified in said addendum, which are germane to the issues, being as follows:

- "(a) Being stockholders of the Crane Company, they agree to be bound by the terms and conditions of the agreement of June 11, 1914, so far as said agreement affected the Crane Company or themselves, as stockholders;
- "(b) that they, in compliance with the terms of Article XI of said agreement of June 11, 1914, will execute and perform the agreement contained in Exhibit 'E';
- "(3) that the sole obligations, which are germane to the issues here involved, imposed upon the other members of the Crane family under the provisions of Exhibit 'E', are to cause to be transferred and delivered to The Northern Trust Company, as Trustee, 1,000 shares of stock of the Crane Company, to be held by said Trustee during the lifetime of Emily H. Junkin, subject to the following provisions:
 - "(a) From the dividends thereon and the income from other securities, the annuity payments provided for Emily H. Crane under the terms of the agreement of December 2, 1912, were to be made:
 - "(b) One-seventh of the sum necessary to make the said annuity payments to be taken from the dividends received from each 1,000 shares of the stock transferred and delivered to the Trustee;
 - "(c) To pay over any excess dividends not required for said purposes to the person who deposited said 1,000 shares of stock;
 - "(d) The Trustee, upon the death of Emily H. Junkin, to retransfer and redeliver the said 1,000 shares of stock to the person so depositing them;

other members of the Gram family did not essue or became bound by the terms of said agreement of June 11, 1914, except for the limited purposes specifically set forth in said addendum and Enhibit 'E'; the limited purposes specified in said addendum, which are garmane to the issues, being as follows:

- "(2) Being stockholders of the Grane Company, they saree to be bound by the terms and cenditions of the agreement of June 11, 1914, so far as said agreement affected the
- "(b) that they, in compliance with the terms of article
 "XI of said agreement of June 11, 1914, will execute and perform the agreement contained in Mahibit 184;
- the issues here involved, imposes upon the other members of the Organe family under the provisions of imidalt 'E', are to cause to be transferred and delivered to The Horthern Trust dempuny, as Trustee, 1,000 sheres of stock of the Orane Jospeny, to be held by said Trustee during the lifetime of Eatly E. Suskin, subject to the
- "(a) From the dividends thereon and the income from other securities, the sereement of December 2, 1912, were to
 - "(b) One-seventh of the sum necessary to make the said approach payments to be taken from the dividends received from each 1,000 shares of the stock transferred and delivered to
 - "(c) To pay over any excess dividends not required for said purposes to the person who deposited said 1,000 shaves of stock;
 - (0) ... retransfer and redeliver the said 1,000 sheres of stock to the

"(4) that the following provision of the agreement of June 11, 1914, Article XI,

""* * * therefore the said Kate C. Gartz, Frances C.
Lillie, Mary C. Russell, Mmily C. Chadbourne and herbert P.
Crane do severally agree to pay, on demand, one-seventh of
all money which may be due and payable under said agreement
of December 2, 1912,

is limited and controlled by a subsequent provision of said agreement (Article XI):

"Should the dividends and income received by said The
Northern Trust Company, as Trustee, from the aforesaid 5,000
shares of stock and the \$173,000 face value of First Fortgage
5-1/2% Bonds * * * be insufficient to pay all moneys which are
due and payable under said agreement of December 2, 1912, the
brother and sisters [the other members of the Crane family]
of the parties hereto [Charles R. Crane and Richard T. Crane,
Jr.] severally agree that they will each pay to the "high
bidder" [Richard T. Crane, Jr.], on demand, one-seventh of any
sum which the "high bidder" may be compelled to pay to the said
The Northern Trust Company, in order that he may fully perform
the terms of said agreement of December 2, 1912.";

that said provisions were merely an expression of an intent on the part of Charles R. Crane and Richard T. Crane, Jr. that the other members of the Crane family should assent thereto, but that the other members of the Crane family did not assent thereto in the limited obligations which they assumed under the addendum and Exhibit 'E.' If, however, said provisions were imposed upon the other members of the Crane family by the addendum and Exhibit 'E,' it was a secondary liability upon them, conditioned upon the 'high bidder's' being first compelled to pay to The Northern Trust Company, as Trustee, any deficits occurring in the annuity; that, until the 'high bidder' was compelled to pay said deficits to the Trustee, the secondary liability of the other members of the Crane family did not arise;

"(4) that the following provision of the agreement of

"" * * therefore the said Wate C. Carta, Frances C. Lillie, Mary C. Massell, Emily C. Chadbours and Marbert F. Crane do severally agree to pay, on descaid, one-seventh of all money which may be due and payable under said agreement of December 2, 1912,

is limited and controlled by a subsequent provision of said spreament

"Should the dividends and impose received by said like Northern Trust Company, as Trustee, from the store send to the shapes of stock and the 1173,000 face value of Stret Fortgage 5-1/25 Sonds * * be insufficient to pay all moneys which are due and payable under soid agreement of becomber 2, 1512, the brother and sisters [the other members of the Grone family] of the parties hereto [Gnarles A. Orane and Richard T. Grane, Jr.] severally agree that they will each pay to the "migh bidder" [Richard T. Crane, Jr.], on demond, one-covents of any which the "high bidder" may be conselled to pay to the said and which the may faily perform the terms of said agreement of December 2, 1912.";

that said provisions were merely an expression of an intent on the pert of Charles A. Crane and Michard T. Crane, Jr. that the other members of the Crane family should ascent therete, but that the other members of the Crane family did not ascent therete in the Identical obligations which they assumed under the addendum and Amitbit 'A!' If, mouver, said provisions were imposed upon the other members of the Grane family by the addendum and Exhibit 'A,' it was a secondary liability upon them, conditioned upon the 'high bidder's' being first compelled to pay to The Morthern Trust Company, as Trustee, any deficits content in the four secondary liability of the other members of the Grane family did not arise;

- "(5) that the 'high bidder' alone, after being compelled to pay said deficit to the Trustee if there be a secondary liability could bring a cause of action against the other members of the Crane family, but, since the pleadings contain no allegation and the record is silent as to whether or not the 'high bidder' has made any deficit payments into the amunity fund, the prerequisite for his bringing a cause of action against the other members of the Crane family does not exist; and, under no circumstances, could the Trustee, Emily H. Junkin, or Charles R. Crane and Richard T. Crane, Jr., jointly, bring a cause of action against the other members of the Crane family, as to the annuity deficits;
- "(6) that if a secondary liability is imposed, the limit of the other members of the Crane family is one-seventh of any sum which the 'high bidder' may be compelled to pay on account of the annuity deficits; that, under the provisions of the last paragraph of Article XI of the agreement of June 11, 1914, the maximum personal liability of the 'high bidder' (Richard T. Crane, Jr.) was to pay six-sevenths of any deficit occurring in the annuity fund, and that the secondary liability, if any, of the other members of the Crane family to the 'high bidder' was limited each to a one-seventh of six-sevenths of such annuity deficits; that, since the agreement between Charles R. Crane, Richard T. Crane, Jr. and Emily H. Junkin, dated June 2, 1922, reduced the annuity from \$100,000 to \$85,000, the personal liability of the 'high bidder' from June 2, 1922, was six-sevenths of any deficits which might arise, on the basis of an \$85,000 annuity; and that from June 2, 1922, if any secondary liability is imposed upon the other members of the Crane family, it is limited to a one-seventh each of six-sevenths of any deficit arising in the \$85,000 annuity fund, conditioned upon the 'high bidder's' first being compelled to pay such deficit to the Trustee, for the reason that the agreement of June 2, 1922, specifically reduced the obligation of the 'high bidder' under the terms of the agreement of December 2, 1912, to contribute to any annuity deficits

"(5) that the 'high bidder' alone, efter being compelled to pay said deficit to the fractes - if there be a secondary linbility - could bring a cause of action against the other members of the Grane family, but, since the pleadings centein we allowated and the record is silent as to whether or not the 'high bidder' has made any deficit payments into the account the other members of the for his bringing a cause of action against the other members of the Grane family does not exist, and, wader no circumstances, could the Trustee, Emily H. Junkin, or Charles A. Grane and Elchard T. Grane family, bring a cause of action against the other members of the Grane family, bring a cause of action against the other members of the Grane family, bring a cause of action against the other members of the Grane family, as to the canatity deficits;

that end , become at willistif washnoos a it fait (d)" mue the lo almover-end at the Crane family is one-seventh of any sum cil to juncon no yeq es belleques ed yez 'abble hight' eni delide annuity deflects; that, under the provisions of the last paragraph of Article XI of the agreement of June 11, 1914, the marriamen porcent liability of the 'high bidder' (Michard T. Crane, Jr.) was to pay first has there's times out at guirausso fistion you to addreve-wis the secondary liability, if any, of the other members of the Crana family to the thigh bidder! was limited each to a one-seventh of six-sevenths of such anmaity deficits; that, the agreement between Cherles il, trees, tirese ?. Trees, ir, and mile !. dated June 2, 1922, reduced the annually from alon,000 to 585,000, the personal liability of the 'high bidder' from June 2, 1922, was an to sized out no jestus ingle delick attains you to address the \$85,000 annuity; and that from June 2, 1922, if any secondary lisbility is imposed upon the other members of the Grane faulty, it is gmicirs fibiled and to admesser-ziz to dese discover-one sof beimil in the \$85,000 annuity fund, conditioned upon the 'ligh bidder's' first being compelled to pay such deficit to the Trustee, for the reason that the agreement of June 2, 1922, specifically reduced the obligation of the 'skigh bidder' under the terms of the agreement of December 2, 1912, to contribute to any amunity deficits arising on an \$85,000 annuity rather than on a \$100,000 annuity."

The agreement of June 11, 1914, between Charles R. Crane and Richard T. Crane, Jr., with the "consent" or "addendum" thereto signed by all the other members of the Crane family constitutes, in our judgment, a family settlement agreement. By the will of Richard 1. Crane, Sr., certain provisions were made for his widow, in addition to the provisions made for her by the ante-muptial agreement. It is a reasonable inference, from the record, that the provisions made in the will were not satisfactory to her, and Charles R. Crane and Richard T. Crane, Jr., who were made the residuary legatees of their father's estate, entered into the contract with her of December 2, 1912, by the terms of which the widow received substantially more than the ante-nuptial agreement and her husband's will provided for her, in consideration of which she accepted the provisions of the will in her behalf and ratified the marriage settlement agreement. As appears from the agreement of June 11, 1914, differences arose between Charles R. Crane and Richard F. Crane, Jr., "as to the true interpretation of the provisions of said Will, and as to the future conduct of the affairs of the Crane Company," and of the Crane Valve Company, which differences had been, and if not adjusted would continue to be, detrimental to the conduct of the business, "and prejudicial to the interests of all stockholders therein," and it was believed that the best interests of both said corporations and of the stockholders therein required that either Charles R. or Richard T., Jr., should dispose of his interest in the stock of both said corporations. The other members of the family were substantial stockholders of the Crane Company and Charles R. and Richard T., Jr., considered that their consent was necessary for the consummation of the plan which they, Charles R. and Richard T., Jr., had agreed upon for the purchase by the Company of the interest of one or the other of them. It also seems clear that the other members of the family concluded that, in view of the situation, they were in

orising on an 787,000 annuity rather than on a (100,006 annuity."

The arrecment of June 11, 1914, between Charles H. Crane and Michael I. Orane, Jr., with the "compant" or "addendum" thereto gestutitanco ylims? energ but to arednen regio ent ile yd bengie in our judgment, a family settlement agreement. By the will of Richard T. Grane, Dr., certain provisions were made for his widow, in addition to the provisions made for her by the auto-maptial agreement. It has presonable interacts, from the record, that the provisions made in the will were not satisfactory to her, and Charles R. Crame and Richard T. Crame, Jr., who were made the residuary legatees of their father's estate, entered into the contract with her of December 2, 1912, by the terms of which the widow received substantially more than the aute-amptial agreement and her husband's will provided for her, in consideration of which she accepted the provisions of the will in her behalf and ratified the marriage settlement agreement. As appears from the agreement of June 11, 1914, differences arose between Charles R. Orane and Richard W. Orane, Jr., "as to the true interpretation of the provisions of said Will; and as to the future conduct of the affairs of the Crane Company," and of the Crane Valve Company, which differences had been, and if not adjusted would contimus to be, detrimental to the conduct of the business, "and prejudicial to the interests of all stockholders therein," and the was believed that the best interests of both said corporations and of the stockholders therein required that either Charles H. or Netter of the state of his interest in the state of both said corporations. The other members of the family were substantial stockholders of the Crame Company and Cherles R. and Richard -mos sif ror yessessen was necessary ror that the consider of the consummation of the plen which they, Charles R. and Richard T., Jr., . had agraed upon for the purchase by the Company of the interest of one or the other of them. It also seems clear that the other members of the family concluded that, in view of the situation, they were in

a position to demand of Charles R. and Richard T., Jr., a share of the father's estate, which by the terms of his will was given to Charles R. and Richard T., Jr. It also seems clear that the latter were willing to grant the demand, provided that their brother and sisters would share the surden of the agreement of December 2. 1912, wherein Charles R. and Richard T., Jr., had guaranteed to the stepmother a net income of \$100,000 per year so long as she should live. In the agreement of June 11, 1914, Charles R. and Richard T., Jr., after stating that differences had arisen between them as to the true interpretation of the provisions of their father's will and as to the future conduct of the affairs of the Crane Company, recite: "Whereas, the parties hereto desire that a part of the property which comprised the estate of Richard T. Crane, Senior, shall be set aside to create certain charitable funds, and further desire that the sisters and brother of the parties hereto shall each receive some of the stock of the Crane Company formerly owned by Richard T. Crane, Senior, notwithstanding the fact that none of said stock was devised to said sisters and brother * * * . " The agreement next refers to the contract of December 2, 1912, and recites: "Whereas, all children of said Richard T. Crane, deceased, desire that the burdens of said agreement of December 2, 1912, should be borne by all children of Richard T. Crane, deceased, who receive any share in his estate, and by their heirs and personal representatives * * *." Article II provides: "Within Thirty days after the terms and form of the bonds and mortgage or trust deed hereinafter provided for shall have been agreed upon, and Herbert P. Crane, Kate C. Gartz, Mary C. Russell, Frances C. Lillie and Emily C. Chadbourne (who together with the parties hereto are the sole surviving children of Richard T. Crane, deceased) shall have executed their several consents to the terms of this contract, in the form hereto attached, each of the parties hereto shall," etc. Article XVII provides: "This agreement, when carried into effect, shall operate as a complete settlement of all the aforesaid differences between the parties hereto, and as a

a position to demand of Charles A. and Richard I., In., a chare . of the father's estate, which by the terms of his will, was given to Charles R. and Richard F. Jr. It also seems close that the action were willing to grant the demant, provided that their brother and staters would share who burden of the agreement of December R. 1912, wherein Charles B. and Sichard T., Ir., bad guaranteed to the stepmether a met income of \$100,000 per so long as she chould Live - In the expension of runs II, 1814, therefore II, one particular II. Jr., efter stating that differences had erisen between them as to the free interpretation of the provisions of their father, and as to the future conduct of the effairs of the Creme Company, recite: dolly groupe and le true a tada ericab otered acting and leaved." comprised the catete of Micherd P. Crane, Senior, shall be set saids the special couldness of the price of the land of the couldness of the cou he was estimated the plant storm relices mit he nother has entitle Character of the Jense County County again to State and Larged to stall that he was but fast att auding albeing rokes to said claims and include 4 s. To appearing the said place of the contract of December 2, 1912, and recites: "Shereas, all childto add the day of the party decises, decise the broad of eath agreement to December t, 1912, should be borne by all children of Richard T. Grane, deceased, who receive any share in his estate, and by their heir send personal representatives # # #. a article II president the rest has easy all early against taken at the banks meed even illade not bedivery restantered beed sent to egastrom bus agreed upon, and Merbert P. Crane, Mete C. Cartz, Mary C. Russell. Process of Little and Reily S. Chathours (who reprint the Tay parties hereto ere the sole surviving children of Richard T. Crane, amus of of sineence laraves their between evan Llade (becaseeb of this contract, in the form hereto attached, each of the parties and almost a side tamble on 1202 slotter . or o " . for elected Carried into effect, shall operate as a complete settlement to a na has paret solving mir peerwo secretific biscomple wil

release by each of all claims which he may have against the other. and shall also operate as a release and discharge by each of the persons who signs the consent attached hereto of all claims which he or she may have, or may have asserted against the parties hereto, or either one of them, in any manner whatsoever, arising because or out of the Estate of said testator, or out of any agreements or negotiations heretofore had as to the distribution of the estate of said testator, or as to the setting apart by the parties hereto of shares of stock of the Crane Company to the several parties signing such consent; and shall also operate as a full release and discharge to the Crane Company of any claims and demands which either of the parties hereto, or any of the persons signing said consent, may have, or may at any time have asserted, growing, or arising out of the failure of any of said parties to secure the right at any time in the past to subscribe for, purchase or receive, any stock of the Crane Company; and the parties who have executed the consent attached hereto severally agree that they accept the stock allotted to them in Article X hereof in full satisfaction of any claim, legal, equitable or moral, which they have up to the date hereof to stock of the Crane Company, and each of said parties agrees that he or she will, upon the execution of this agreement, execute and deliver to the Crane Company a release which shall be in the form as set out in Exhibit H which is attached hereto."

Article I provides that the executors of the estate of Richard T. Crane, Sr., shall immediately transfer and deliver to The Northern Trust Company, as trustee under the agreement of December 2, 1912, 2,500 shares of "Estate Stock," to be held by said trustee in lieu of the 2,500 shares of Crane stock previously transferred to it by Charles R. Crane. The article also sets forth the amount of Crane Company stock which will be held as "Estate Stock" when the transfers therein specified shall have been made, amounting to 55,217 shares, and, in addition thereto, the 5,000 shares standing in the name of The Northern Trust Company as trustee under the contract of December 2, 1912. It appears from Article III of the agreement that

release by each of all claims which he may have against the other, and the less operate as a release and discharge by each to the persons who signs the consent attacked herevo of all claims which he or she may have, or may have asserted against the perties hereio, or either one of them, in any manner whatsoever, arising because or out of the Estate of said testator, or out of any agreements or negotiations heretofore had as to the distribution of the estate of To oferand estring what the apart by the parties meret of shares of stock of the Crane Company to the several parties simpling such concent; and shall also operate as a full release and discharge to the Crane Company of any claims and demands which wither of the parties hereto, or any of the persons signing said consent, may have, or may at any time inve asserted, growing, or arising out of the at omit yes is this relies to secure the rather to any time the past to subscribe for, purchase or receive, any stock of the Crane Company: and the parties who have executed the commont attached hereto severally agree that they accept the stock allotted to them in Article X hereof in full satisfaction of any claim, legal, equitable or moral, which they have up to the date hereof to stock of the Crane Company, and each of said parties agrees that he or she will, upon energ ent of reviled bus especial the control of the Creme Company a release which shall be in the form as set out in Ethibit M which is attached hereto. "

Article I provides that the executors of the estate of Richard T. Crane, Sr., shall immediately transfer and deliver to The Dortain I. 1. Jun. 17, or with the Latter of Doctor 12, 2,500 shares of "Estate Stock," to be held by said trustes in lieu of the 2,500 shares of Crane stock previously transferred to it by Charles R. Crane. The article also sets forth the amount of Crane donyour stock high mill be held as "Estate took" one the transfers in the transfers the shall have been ado, ancusting the shares, and, in addition therete, the 5,000 since the first took when of The morthern trust Company as true units in the shares, and, in addition therete, the 5,000 since the life to the up of the shares of the up of the up of the shares of the up of the up of the up of the up of the shares of the up of the up of the up of the shares of the up of the up of the shares of the up of the up of the up of the up of the shares of the up of the up of the shares of the up of the up of the shares of the up of the up of the shares of the up of the up of the shares o

there was a credit of 3741,030.57 on account of an unpaid dividend of eighteen per cent on "Estate Stock" standing on the books of the Crane Company to the credit of the estate of Richard T. Crane, deceased, and the said article provides for the distribution. Article X provides that the "Estate Stock" which shall remain after all of the transfers thereof therein provided for, for charitable and other purposes therein described, "shall be divided into five equal portions for the equal benefit of the four sisters and one brother of the parties hereto, and said portions shall be transferred and delivered in the manner provided in Article XI hereof. " (Italics ours.) In Article XI appears the following: " * * * inasmuch as said agreement was made for the protection and benefit of the Estate of Richard T. Crane, deceased, and Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Mmily C. Chadbourne and Herbert P. Crane, the sisters and brother of the parties hereto are now about to receive considerable portions of that estate, therefore, the said Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Smily C. Chadbourne and Herbert P. Crane do severally agree to pay on demand one-seventh of all money which may be due and payable under said agreement of December 2. 1912." (Italics ours.) Article XII provides: "For Five years after the date when the Crane Company purchases the interest of 'the seller' as hereinabove provided, all stock of the Crane Company which is owned, or the voting power of which is controlled, by the parties hereto, or by the persons signing the consent attached to this contract, shall be voted at all elections of directors of the Crane Company in favor of such persons for directors of said company as shall be named by the 'high bidder.' provided that he shall so long survive and remain the holder of a majority of the total stock of said Crane Company which may from time to time be issued and outstanding." Article XIX provides: "Each of the several agreements herein contained is dependent upon each of the others, and is to be binding only in case this entire agreement is carried out." (Italics ours.) Immediately following the signatures of Charles R. Crane and Richard T. Crane, Jr.,

there was a credit of 3741,030.57 on account of an unpul dividend of cighteen per cent on "Estate Stock" standing of the books of the Grane Company to the enadit of the estate of Richers T. Grane, deconsed, and the said article provides for the distribution Article To ils retts misser flams dainy "manta etata" ent tent senivoru X reads and eldaters to rot to be be be to there and the constant of purposes two-sla dougsload, "shall be diplied late from equal norto saident men has abstall your till of themed lawes and see the coall the heavyleaged of Clair and your blacker, along the heavyleaged ". heren I mistra al sublycon record ad at forestich him to former a to the first our strange is sind at it was To efficiel and to fillward has notified on sail and some one does Middle P. Grace, Greened, and Lake C. Digle, Propose C. Mille. hart C. Renell, Cally J. Sundannya and Scient J. Sane, the status aldered by the sylvent of limit were translated enlighted and in small and chines of that antice, countries, the seal live at Corte, Property MILLS Hors C. Marsl. Mile U. Th. Color and J. Com delly year if to They are not been been been as as of north of the tent of " I TOT AT SWIE --- to fine eras blas volce oldense bin out he yes and reflace ourse of a selection of the file of the course of the line of the course of the line of the course of the line of date when the Urane Company purchases the interest of the seller! as hereinsbove provided, all stock of the Grane Company which is owned, or the voting power of which is controlled, by the parties hereto, or by the persons signing the consent attached to this contract, shall be voted at all elections of directors of the Grane Company in favor of such persons for directors of said company as anof os flads of that belivorg ! provided that he shall so long bice to hook fatot of the majority of the total stock of the survive Crane Company which may from time to time be issued and outstanding." bunkatnoo miorma atau araa latawa and la man" assaires all stalles one only the extended as as all box , and o at to down one conference at "Matalbassi" (.esto askladi) ".too bolyang il soo est eside side following the signatures of Charles R. Crane and Richard T. Crane, Jr.,

to the agreement appears the following:

"In consideration of the benefits which will be received by us under the terms of the foregoing agreement between Charles R. Crane and Richard T. Crane, Junior, dated June eleventh, 1914. and of the provisions contained in said agreement affecting us, we, the undersigned, being children of Richard T. Crane, deceased, and stockholders in the Crane Company, do severally hereby agree, each with the other, and with the said Charles R. Crane and Richard T. Crane, Junior, to all the terms and conditions of said agreement, so far as the same affect the Crane Company, or ourselves; and we do further severally agree that the Crane Company may purchase the stock of 'the seller' and may purchase the assets and business of the Crane Valve Company in the manner, for the price, and upon the terms, and may pay for the same in the manner, in said agreement set forth; and that the Board of Directors of the Crane Company shall be selected, and by-laws adopted, as provided in said agreement; and that as stockholders of said Crane Company, we will vote all stock owned and controlled by us in such way as to give effect to all the terms and conditions of said agreement and will specifically perform the terms of article XII of said agreement, and we severally agree that we will each of us, in compliance with the terms of Article XI of said agreement, execute and perform the agreement of which Exhibit E, which is hereto attached, is a copy; and the undersigned, Emily Crane Chadbourne, agrees that she will, in compliance with the provisions of Article XI of said agreement, execute and perform the agreement of which Exhibit F is a copy; and we all agree that we will, in compliance with the terms of irticle XVII of said agreement, execute the instrument of which Exhibit H is a copy.

"This agreement shall be binding upon and enure to the benefit of the parties hereto, and their respective heirs, executors, administrators, personal representatives and assigns.

"IN WITNESS WHEREOF we have hereunto set our Hands and

to the agreement appears the followings

"In consideration of the benefits which while be received by us under the terms of the foregoing agreement becases therles A. Crane and Michard T. Crane, Junior, daugd June eleventh, 1914, and of the provisions contained in said agreement affecting us, we, the undersigned, being children of Alchard T. Crame, deceased, and stockholders in the Crane Company, do severally hereby agree, oach with the other, and with the said Charles N. Crane and Michard T. Grane, Jundor, to all the terms and contilions of said agreement, so far as the same affect the Grane Jongany, or ourselves; and we do further severally agree that the Grane Jonessy may purchase the to sachiast the assets of the purchase the assets and the sachias the Crane Valve Company in the manner, for the price, and upon the terms, and may pay for the same in the manner, in said sgreement ynagaou ensit is are Board of Directors of the Crane Company shall be selected, and by-laws adopted, as provided in said sgreement; and that as stockholders of said Crane Jengany, we will vote toelle evia or as you done at at ye bellevince has beene abote ils -filoga Like bus themostine fine to encitable and will appoint cally perform the terms of article XII of said agreement, and we sat dit we will each of us. in compliance that the server terms of Article XI of said agreement, execute and perform the agreement of which lixhibit M. which is hereto attached, is a copy; and the undersigned, imily Grane Chadbourne, agrees that she will; in compliance with the provisions of inticle II of said agreement, execute and perform the agreement of which I hiddle I is a copy; and elelital to caret ent dita constigues at alle ew tadt eerge ile ew H fiditial delive to insurant edf ejusers, insurange bise to HVII is a copy.

"This agreement shall be binding upont of the parties hereto, and their respective heirs, excutors, administrators, personal representatives and assigns.

Seals this Eleventh day of June, A. D. 1914.

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"Kate C. Gartz (Seal)
"Frances C. Lillie (Seal)
"Mary C. Russell (Seal)
"Emily Crane Chadbourne (Seal)
"Herbert P. Crane (Seal)" (Italics ours.)
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Upon the same date all of the parties executed the trust agreement referred to as Exhibit E. and the appellants contend that the "addendum" to the agreement of June 11, 1914, and Exhibit E control the obligations of the members of the Crane family other than Charles R. and Richard T., Jr. The agreement signed by Charles R. and Richard T., Jr., and the so-called "addendum" or "consent." in our judgment, are parts of one agreement, which has been called "the Family Settlement Agreement." As well stated by counsel for appellees: "* * * whereas it is perfectly apparent from the terms of said agreement, as above indicated, that it was one between all the members of the Crane family for the purpose not only of providing for the control and management of said Crane Company by the so-called 'high bidder' and of settling the differences between the two brothers with respect thereto, but also for the purpose of settling the differences between the two brothers and their other brother and sisters arising out of rights or claims, 'legal, equitable or moral, ' which the latter had asserted with respect to the provisions of their father's Will, and with respect to some share of the 'Estate Stock' held by the estate of their said father, Richard T. Crane, Sr., as well as for the express purpose of carrying out the expressed desire of all the children of said Richard T. Crane. Sr., that the burdens of said Agreement of December 2, 1912, should be borne by all children of Richard T. Crane, deceased, who might receive any share of his estate. Said agreement expressly provided for the division of such part of the 'Estate Stock' as should remain after the transfer of certain portions thereof as in said agreement specified, into five equal parts for the equal benefit of the other members of the family in the manner provided in Article XI of said agreement, and, as above stated, that they accepted the stock so

Seals this Weventh day of June, A. D. 1914.

"Emily Cramo Chadbourne (Seal)
"Herbert F. Crame (Soal)" (Italia

Upon the same date all of the parties executed the trust agreement referred to as Eddibit B. and the appellants contend that I Jidhili and .4191 .11 sant to Jessenge and to Judendam" control the obligations of the members of the Crame family other than Charles M. and Richard T., Jr. The agreement signed by Charles W. incomos" to "mubushba" belies -os edd bus .. Tt . . T bradelil bus .. in our judgment, are purts of one agreement, which has been called "time Family Settlement agreement." As well stated by counsel in appelless: " whoreas it is perfectly apperent from the terms Ils neswort, as above indicated, that it was one between il -bivorg to when some family for the purpose not only of providout yd ynsganol sant'd bist lo insmegenen bas lotinos tit tot gai so-called 'high bidder' and of settling the differences between the two brothers with respect thereto, but also for the purpose of rende riend bus arendro wis the two brothers and their renders are brother and sisters erising out of rights or claims, 'legal, of form of moral, which the latter had asserted with respect to the provisions of their father's Will, and with respect to some redish blas right lo estate ed to bled 'Hook' state of the orang Alchard T. Crame, Sr., as well as for the express purpose of carrying one the expression dealers of the the ordination of the followed T. Trans. blands . It's reduced to Jacoberga blac to amended at Judy . To be borne by all children of Richard I. Crane, deceased, who might receive any share of his estate. Said agreement expressly provided min reference to thest strate of the free force to not ivit all well from any oil of a le real ancircon present to reference at redic This of to the collaps the sol with one evil of the cities qu mapers of the fault, in the mamor provided in critche II of relaagroement, and, as above stated, that they accepted the stock so

allotted to them in full satisfaction of any claims which they (all of said children except said Charles R. Crane and Richard T. Crane, Jr.) might have or might have asserted, arising out of the failure of any of the last named parties to secure the right at any time in the past to subscribe for, purchase or receive any stock of the Crane Company. Furthermore, Article I of said Family Settlement Agreement expressly provides that the executors of the estate of Richard T. Crane, Sr., shall immediately transfer and deliver to The Northern Trust Company, as Trustee under said Agreement of December 2, 1912, 2,500 shares of 'Estate Stock,' to be held by said Trustee in lieu of the 2.500 shares of Crane stock previously transferred to it by Charles R. Crane; and sets forth the amount of Crane Company stock which will be held as 'Estate Stock' when the transfers thereof therein specified shall have been made, amounting to 55,217 shares, and, in addition thereto, the 5,000 shares standing in the name of The Northern Trust Company as Trustee under said contract of December 2, 1912. It also appears by Article III of said agreement that there was still a credit of \$741,030.57 on account of an unpaid dividend of 18% on 'Estate Stock' standing on the books of Crane Company to the credit of the estate of Richard T. Crane. deceased, the distribution of which is therein provided for." Exhibit E (Article I) provides that each of the members of the Crane family shall transfer and deliver to The Northern Trust Company, as Trustee, certain securities, which are to be held by the trustee during the life of Mrs. Junkin, subject to the following terms and conditions:

"Paragraph (a). Second parties and third party agree that from the dividends and income derived from said 6,000 shares of stock and \$195,000 face value of bonds there shall be made the payments provided for in Paragraph 2 of said agreement of December 2, 1912, and all other payments, if any, which Charles R. Grane and Richard T. Grane, Junior, covenanted in said agreement of December 2, 1912, to make, and that one-seventh of the sum necessary to make said payments shall be taken from the dividends received from each 1,000 shares of stock

allotted to them in full satisfaction of any claims which they (all of said children except said Charles R. Grane and Michard P. Grane. Jr.) might have or might have saserted, arising out of the failure at emit was ta read out occurs to secure the tage to the last and to the past to subscribe for, purchase or receive any stock of the Crane Company, Furthermore, Article I of said Family Settlement Agreement expressly provides that the executors of the estate of Michard T. Crane. Sr., shall immodiately transfer and deliver to The Morthern Frank Congress, as Translet women and there are becomen as block 2. 700 shares of 'Estate Stock,' to be held by seld Trustee in lieu of the 2,500 shares of Crane stock previoualy transferred to it by Charles R. Crane; and sets forth the amount of Crane Company stock which will bellions mieraid losusif arelanari ent mente 'aloof etatall' as bled ed shall have been made, amounting to 55,217 shares, and, in addition thereto, the 5.000 shares standard in the name of The Northern Track Company as trustee under said contract of Jecomber 2. 1912. It slas there a lifts aw steat that themest ales to III of the very design of 2741.030.77 on account of an unusid dividend of 18% on 'Estate Stock' standing on the books of Crane Company to the credit of the estate of Michael T. Crane, deceased, the distribution of which is To does just selivous (I sleiful) & fidded ". To hebivous misterij the members of the Crans family shall transfer and for the Tombon out Morthern Trust Company, as Trustee, certain securities, which are to be held by the trustee during the life of Mrs. Junkin, subject to the complying the new forther in

"Paragraph (a). Second parties and third party agree that from the dividends and income derived from said 6,000 shares of stock and \$195,000 face value of bonds there shall be made the payments provide for it is a regular to the payments of the face in the face of the from the dividends received from each 1,000 shares of stock

transferred and delivered to said The Morthern Trust Company, as above set out, and one-seventh of the sum necessary to make said payments shall be taken from the interest collected from the bonds transferred and delivered to the said The Morthern Trust Company, as above set out.

"Paragraph (b). Said The Northern Trust Company shall keep separate accounts with each of second parties, and shall collect the dividends received from each 1,000 shares of stock transferred by each of second parties who shall have transferred stock hereunder, and shall pay from the dividends received from each 1,000 shares, one-seventh of all payments which shall be made in accordance with Paragraph 2 of said agreement of December 2, 1912, and one-seventh of all moneys which Charles R. Crane and Richard T. Crane, Junior, covenanted by said agreement of December 2, 1912, to pay, and said The Northern Trust Company shall pay the remainder of said dividends, if any there shall be, to the person who deposited said 1,000 shares of stock. In addition thereto said The Northern Trust Company shall collect all interest which may be paid on said \$195,000 face value of bonds, and shall pay therefrom oneseventh of all payments which shall be made in accordance with Paragraph 2 of said agreement of December 2, 1912, and one-seventh of all moneys which Charles R. Crane and Richard T. Crane, Junior, covenanted in said agreement of December 2, 1912, to pay. And said The Northern Trust Company shall pay the remainder of such interest, if any there shall be, to said Charles R. Crane.

"Paragraph (c). In the event that any of said second parties shall die prior to the death of Emily Hutchinson Junkin, said The Northern Trust Company shall pay to the executors, administrators and assigns of the person who shall so have died, all moneys which would have been paid to such person had he or she not died.

"Paragraph (d). Upon the death of the said Emily Mutchinson
Junkin, said The Northern Trust Company, as Trustee, shall transfer and
deliver to each of second parties, and in the event of the death of any
of second parties then to their executors, administrators and assigns,
the stock or bonds so transferred and delivered by them to the said

transferred and delivered to said The Northern frust Company, as above set out, and one-seventh of the sum necessary to make said payments shall be taken from the interest cellected from the bonds transferred and delivered to the said The Northern Trust Company, as above set out.

"Paragraph (b). Said The Morthern Trust Company shall keep separate accounts with each of second parties, and shall collect the dividends received from each 1,000 shares of stock transferred by each Here has the profite who shall have transferred stook horsemader, and shall pay from the circulative received from some lives signed, one-events of all parameter that could be a fire or a fire of the country of the sparse are not be also been a left, and seemed to Josephine Charles H. Crane and Eddack T. Crane, Journey are will be all givenment of December 2, 1912, to pay, and said The Morthorn Trust Company or ed Hade renainder of said dividends, if any there shall be, or the person who deposited said 1,000 shares of stock. In addition thereto said The Morthern Trust Company shall collect all interest which may be paid on said \$195,000 face value of bonds, and shall pay therefrom oneseventh of all payments which shall be made in accordance with Peragraph ayeace lie to wasve-one of little to live state to I which Charles R. Crane and Michard T. Crane, Junior, covenanted in said agreement of December 2, 1912, to pay. And said The Northern Trust capany shall pay the remainder of such interest, if any there shall be, to said thoughes h, true,

"Paragraph (c). In the event that any of said second parties that the prior the parties worthern Trust Company shall pay to the executors, administrators and assigns of the person who shall so have died, all moneys which would have been paid to such person had he or she not died.

"Persgraph (d). Upon the death of the said Maily Nutchinson Junely, and the said Maily Nutchinson Junely, and Junely, as Trustee, shall transfer and diliver to would at the parties, and in the event of the death of any of analysis and essigns, the vectors and essigns, the vector of the death of the death of the vectors and essigns,

The Northern Trust Company, as Trustee, as hereinabove set out."
(Italics ours.)

Paragraph 2 of the agreement of December 2, 1912, between Charles R. and Richard T., Jr., and the widow of Richard T. Crane. deceased. provides for the payment, quarterly, of so much of the dividends and income of certain securities as is necessary to make her net annual income, including the net amount of income which she shall receive from the marriage settlement agreement and the Atchison bonds, the sum of \$100,000. Each of the parties to the trust agreement (Exhibit E) authorized the trustee to pay his or her one-seventh of all payments which were to be made in accordance with said Paragraph 2 to Mrs. Junkin. This trust agreement did not modify the personal obligation assumed by each of the members of the Crane family to pay one-seventh of any deficit which might arise. At the time of the signing of the trust agreement, all of the parties undoubtedly expected that the income from the securities so deposited with the Trust Company, together with the income from the Atchison bonds which had been given to Mrs. Junkin by the terms of the ante-nuptial agreement, would be amply sufficient to provide for the payment of the guaranteed income of 100,000. The record shows that the Crane Company paid a dividend of eighteen per cent in one year, and it was not until it passed its dividend on March 15, 1932. that a deficit arose. This is not the first law suit that was born of the great depression. Three of the Crane children, Frances C. Lillie, Mary C. Russell and Emily C. Chadbourne, have each paid their respective shares of the deficit in full, and they are not parties to t is appeal. The complaint as amended alleges that "since the execution of said Trust Agreement of June 11, 1914, plaintiff [The Northern Trust Company], as such Trustee, has rendered to each of the parties thereto separate statements of account, as provided thereby, showing the income received by plaintiff from said securities, and the application thereof, and, since the same arose as aforesaid, showing the amount of the current deficits

mille The Morthern Trust Company, as Trustee, as hereinsbove set out.".
(Italics ours.)

Paragraph 2 of the agreement of December 2, 1912, between Charles R. and Richard T., Jr., and the widow of Richard T. Crane, deceased, provides for the payment, querterly, of so much of the dividents and income of certain securities as is necessary to make her net Ilegia and deline occord to Juste net product of income and occord launce goalded, ent bus inemperas inemplifes analyses out mort evicer bonds, the swm of \$100,000, Mack of the parties to the trust arreement (Achibit E) sutherized the trustee to pay his or her one-seventh of all payments which were to be made in secondance with sold Paragraph 2 to Mrs. Junkin. This trust egreenent did no. modify the personal obligation assured by each of the members of the Crane oni ta , suits dalam deline fieliab yas to dinevez-one yaq of ylimel -we salitacy out to Lis . tramserys saura out to maingle and to amin doubtedly expected that the income from the securities so deposited with the Trust Corpany, together with the income from the Atchicon bonds would have caved to are. Journal by the recess of the ante-nuptial agreement, would be emply sufficient to provide for and buses all ,000,007 to smeet headproxy all to dampe the that the Creme Company paid a dividend of significan per sent in sec 252f. it was not until It passed its dividend on Ward it. myod asw johl ise was itrie the tirst law suit that was a doller of the great depression. Three of the Crane children, Frances C. Lillia, Mary C. Russell and Maily C. Chedinourse, have each paid for era year bus allor at theireb and to search evidogeou rieds parties to this appeal. The complaint as amended alleges that "since the execution of said Trust Agreement of June 11, 1914, plaintiff [The Horthorn Trust Company], as such Trustee, has rendered to each of the parties therete separate statements of account, as provided thereby, showing the income received by plaintiff from said securities, and the application thereof, and, since the atipileb therape end le tupeme end animode biscorols as seers ames

and the amount due from them, respectively, on account thereof, and has made demand upon each of them for immediate payment thereof. Each of the said parties has heretofore recognized his or her liability for their respective shares of such deficits as provided by said 'Family Settlement Agreement,' and the said parties by their acts have construed the said agreement to obligate them to pay their proportionate shares of such deficit quarterly as the same arises." The testimony shows that in accordance with the provisions of the trust agreement (Exhibit E), separate accounts were kept by the trustee, and statements were rendered to each member of the family, quarterly, down to the time of the filing of the instant complaint, a period of nearly twenty-three years. It appears that these statements were rendered by The Northern Trust Company, "as Trustee for Emily H. Junkin, under an agreement dated December 2, 1912, between Charles P. Crane and Richard T. Crane, Jr., and under a supplemental agreement dated June 11, 1914, between those parties and Herbert P. Crane, Kate C. Gartz, Mary C. Russell and Emily C. Chadbourne, covering the quarter year ending June 2, 1938, * * * to each of the members of the family, that is, the parties interested; and statements substantially in the same form were rendered from June 2, 1922, down to date." From and after June 2, 1922, the date of the agreement between Charles R. and Richard T., Jr., with Mrs. Junkin, by which her guaranteed income was reduced from \$100,000 to \$85,000 per year, the statements were rendered in accordance with the written orders of Mrs. Junkin to the Trust Company and showed the basis upon which the same were made, and that Charles R. and Richard T., Jr., were being charged on the basis of \$85,000 and the other members of the family were being charged on the basis of \$100,000 per year, and no objection was ever made by any of the members of the family to the statements as rendered. Merbert P. called upon Harold H. Rockwell, trust officer and vice president of The Northern Trust Company, in reference to the deficits that had accrued, but made no objections to any of the statements rendered to him by the trustee, nor did he deny his liability as shown by said

and the amount one them them, they are the interest of durante adalescent vol maid to done now buredists payment and decimpose surbitated and saffing also sale to doubt thereally as at latic done to severe evidence or tend to the title tend to provided by said 'Family Settlement Agrament,' and the said parties by their acts have construed the seld agreement to obligate vireframe distinct four to counte elemoidrogory risht yay of modd at the seme arises. "The testimony shows that in accordance with the provisions of the trust egreeon; (Minishi a), separate and were leaf by the trackee, and statements were rendered to each member of the family, quarterly, down to time of the faling of the instant complaint, a reriod of scarly twenty-times years. It openers that there statements were rendered by The continers Trust Company, "as Trustee for Maily H. Junkin, under an agreement detal Secember 2, 1912, between Charles F. Grane and Richard R. Grane, Jr., and under a supplemental agreement dated June 11, 1914, between those purties and the horse of the County of the County of the County of the County of Chadbourne, covering the quarter year ending June 2, 1938, * * to each of the members of the family, that is, the parties interested; mort berehaar even mot oute edd at allatinedades stammedets bas June 2, 1922, down to dute." From and efter June 2, 1922, the date of the agreement between Charles R. and Michard T., Jr., with Mrs. Dinking by which has presented transmit and dalay of ablance to 985,000 per year, the statements were rendered in accordance with the written orders of Mrs. Junion to the Trust Company and shows the basis upon which the same wore made, and that Charles H. and Richard T., Jr., were being charged on the basis of \$85,000 and the to alred self no begrade gaied stew vilmel out lo avednem vento \$100,000 per year, and no objection was ever made by any of the mbers of the family to the statements as rendered. solled upon tameld S. Nouhwell, trues officer and wise creeking of The Worthern Trust Company, in reference to the deficits that bereiner simenests and to any to any of the settements rendered bice yd nwone as ydilidell sid ynob ad bib rou estrurt od tyd mid od

statements. A. F. Gartz, Jr., made no objection to the amount of the deficits shown by the statements to be due from Kate C. Gartz, and after the closing of the estate of Richard T., Jr., ... F. Gartz wrote the trustee a letter, received by the latter on January 24, 1933. reading: "Enclosed you will please find a check to your order for \$2852.51, being the amount of deficit on Mrs. Junkin's trust due from Kate C. Gertz." (Italics ours.) On September 24, 1935, Gartz paid to the trustee the sum of \$10,000 and received from the trustee the following receipt: "Received the sum of \$10,000 from A. F. Gartz. Jr., Trustee for Kate C. Gartz to apply on deficit in her share of the payment due Emily H. Junkin under the terms of agreement dated June 11, 1914." (Italics ours.) On January 29, 1936, Gartz paid to the trustee the sum of \$20,830.48, and received from the trustee "a release running to A. F. Gartz, Jr., Trustee for Kate C. Gartz on account of the deficit of Mrs. Gartz in her contribution to the annuity fund of Emily H. Junkin in the sum of \$20.830.48." Until the filing of their answers neither of the appellants had made any objection to the form of the trustee's statements or to the amounts shown by the statements to be due from time to time on account of the existing deficits. The trial court, in his opinion, commented upon the practice followed by the trustee and the parties to the trust, and held that they knew "what the trustee was doing, how the trustee was stating the account; and their own actions put a stamp of approval on the conduct of the trustee." It is clear that the present contention of the appellants is an afterthought and that over a period of many years all of the parties recognized that the trustee was keeping its accounts correctly. The appellants are now estopped from claiming that the trustee kept its accounts incorrectly.

The trial court held that Kate C. Gartz, Frances C. Lillie, Emily C. Chadbourne, Mary C. Russell and Herbert P. Crane were each liable to plaintiffs to the extent of one-seventh of the deficit.

We affirm the court's ruling in that regard.

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We affirm the court's ruling in that regard.

But the appellants contend that, in any event, since the liability of Charles R. and Richard T., Jr., in reference to the annuity was reduced by the agreement of June 2, 1922, from \$100,000 to \$85,000 the agreement of June 11, 1914, could not impose on the other members of the Crane family a liability as to the annuity deficits greater than the "high bidder" could be compelled to pay: that after June 2, 1922, the "high bidder," Richard T. Crane, Jr., could not be compelled to contribute to a deficit existing on any basis other than \$85,000 per annum, and therefore \$85,000 per annum was the basis for calculation of the annual deficits so far as the other members of the Crane family were concerned; that the trustee. in continuing to charge the other members of the Crane family with one-seventh of the amount which would have been required to pay the widow on the basis of an annual income of \$100,000, failed to give proper effect to the reduction in the annuity fund as provided for by the agreement of June 2, 1922. At first blush there would seem to be equity in this contention, but a careful consideration of the question involved convinces us that there is no merit in it. The agreement of December 2, 1912, constituted an obligation which inured to the benefit of Emily H. Junkin, and the obligation of each member of the Crane family under the family settlement agreement of June 11, 1914, was a several and not a joint obligation. The agreement of June 11, 1914, signed by Charles R. Crane and Richard T. Crane, Jr., recites: (Article II) "Within thirty days after the terms and form of the bonds and mortgage or trust deed hereinafter provided for shall have been agreed upon, and Herbert P. Crane, Kate C. Gartz, Mary C. Russell, Frances C. Lillie and Emily C. Chadbourne (who together with the parties hereto are the sole surviving children of Richard T. Crane, deceased) shall have executed their several consents to the terms of this contract, in the form hereto attached * * *." Article XI recites: "* * * therefore, the said Kate C. Gartz, Frances C. Lillie, Mary C. Russell, Emily C. Chadbourne and Herbert P. Crane do severally agree to pay on demand one-seventh of all money which may be due and payable under said agreement of December 2, 1912."

But the appellants contons that, in any event, since the liability of Charles H. and Michard I., Jr., in reference to the anmity was reduced by the agreement of Jane 2, 1922, from JLOO,000 to \$85,000 the agreement of June 11, 1914, could not impose on the remote soft to transfer a that it as to to the anulty deficits greater than the "high biddier" could be compelled to pay; that after dues 1, 1922, the "days of cour," themes it from the could not be compelled to contribute to a deficit existing on any besis other than \$35,000 per answe, and therefore \$35,000 per answer and as and on adjainab lammas out to noiselected and thank and the other members of the Crim family were concerned; that the Doubles, in continuing to charge the other members of the drame family with and the smount which would have been required to pay the widow on the basis of an annual income of \$100,000, failed to give proper effect to the reduction in the annuity fund as provided for by of mee bluer each theuld thrut 1022, 1922, it is not to the company of the compan be equity in this contention, but a careful consideration of the question involved convinces us that there is no werit in it. berond of December 2, 1912, constituted an obligation which inured to the benefit to Imily H. Junkin, and the obligation of each member the Crane family under the family settlement agreement to June 11, little, was a several and not a joint online does not be the June 11, 1914, signed by Charles A. Crame and Michard T. Crame, Jr., recites: (Article II) "Within thirty days after the terms and form Ilada not behiver reflected beek fourt to execute bus abnot ed to have been agreed upon, and Herbert P. Jrame, Mate C. Gorta, Mary C. Russell, Frances C. Lillie and Emily C. Chadbourne (who together with the parties herete are the sole surviving children of Richard T. Orane, deceased) shall have executed their several consents to the efoij'th " * * benosjja ofered mrof edi ni jostico cidi lo ammej "* " therefore, the said Mate C. Gartz, Frances C. :aeffoor IX Lillies Mary C. Nussell, amily C. Chadbourne and Horbert F. Crane Holes gomes ils to dim ven-ino amient no ter so serie all'entre on may be due and payable under said agreement of December 2, 1912. Article XVII recites: "* * * and the parties who have executed the consent attached hereto severally agree that they accept the stock allotted to them in Article X * * *. " The so-called consent agreement contains the following: " * * we, the undersigned, being children of Richard I. Crane, deceased, and stockholders in the Crane Company, do severally hereby agree, each with the other, and with the said Charles R. Crane and Richard F. Crane, Junior, to all the terms and conditions of said agreement, so far as the same affect the Crane Company, or ourselves * * *." In several other places in the "consent" agreement the words "severally agree" are used. In the trust agreement of June 11, 1914, The Northern Trust Company is directed to keep separate accounts with each of the parties and to pay from the dividends received from each 1,000 shares of stock transferred by each to the trustee one-seventh of all payments to Mrs. Junkin which shall be made in accordance with paragraph 2 of the agreement of December 2, 1912. The reduction in the amount of the guaranteed income to \$85,000 by the contract of June 2, 1922, did not affect the obligations of the other members of the Crane family under the family settlement agreement. Charles R. Crane and Richard T. Crane, Jr., in order to secure the agreement of June 2, 1922, were obliged to release Mrs. Junkin from certain obligations and undertakings assumed by her in the contract of December 2, 1912. Any member of the family might, for a consideration satisfactory to Mrs. Junkin, release himself or herself in whole or in part, of the obligation imposed by the family settlement. As we have heretofore shown, the appellants for many years construed the agreement in question to obligate them to pay, quarterly, to Mrs. Junkin their proportionate shares of any deficit. It would work a grave injustice to The Northern Trust Company, as Trustee, if the instant contention of appellants were sustained.

Several other contentions are argued by appellants in their brief, but it would unduly lengthen this already long opinion to analyze and comment upon the same. Suffice it to say that

Several other contentions are argued by appellants in their brief, but it would unduly lengthen this already long opinion on the several sever

we find no merit in any of them.

Since the appeal was taken to this court Charles R. Crane died and Central Hanover Bank & Trust Company and Lawrason Riggs, Jr., as executors of the last will and testament of Charles R. Crane, deceased, were substituted as appellees.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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- It is morit in any of them.

The a cree of the Circuit cours of Jock county is

CHRISTIAN DECEMBER.

Triand, F. J., and Dallivon, J., comput.

40824

DR. T. E. HARDY, Appellant,

V.

ALBERT J. HORAN, Bailiff of the Municipal Court of Chicago,

Appellee

APPEAL PROM MUNICIPAL

307 LA. 380

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

T. E. Hardy sued albert J. Horan, Bailiff of the Municipal court of Chicago, for damages. In a trial of the cause without a jury the court found the issues against plaintiff and entered judgment in favor of defendant. Plaintiff appeals.

Plaintiff's statement of claim alleges that on February 3, 1938, judgment was entered in his favor against the Kessler Motor & Engineering Corporation for \$4,885.46, in the Superior court of Cook county; that on the same date a writ of execution was placed in the hands of the sheriff, and "that thereby and from that time plaintiff procured and at all times since had a lien upon all of the personal property of said judgment debtor. 2. That notwithstanding said lien, the defendant did levy at two separate times executions upon personal property of said judgment debtor and did sell said property at execution sale as follows: Writ * * * levied March 11, 1938, and sale, March 22, 1938 for \$300 to M. Klass of the following property: * * * [Here follows a description of the personal property.] Writ * * * levied March 22, 1938, and sale April 1, 1938 to A. Rice for \$211 of the following property: * * * [Here follows a description of the personal property.] The proceeds of each of said sales satisfied the claims of the judgment creditor in each of said executions which was the Illinois Malleable Iron Company. 3. That said property was delivered by defendant to the aforesaid respective purchasers. 4. That the property thus sold was greatly in excess of the amounts bid therefor, and that said sales, and delivery resulted in depriving plaintiff of his rights in

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307 I.A. 380°

MR. JUSTICE SCANIAR DELIVERED THE OFINION OF THE COURT.

T. M. Mardy sued albert J. Moran, Dailiff of the Eunicipal court of Chicago, for demages. In a trial of the cause without a jury the court found the issues against plaintiff and entered judgment in favor of defendant. Plaintiff appeals.

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and lien upon the above described personal property; by virtue of which he has suffered a loss and injury to the extent of the value of the property, namely \$990, for which damages be brings this suit."

The following facts are undisputed: On February 14, 1936, Illinois Malleable Iron Company leased the premises at 7720-7722 South Racine avenue to Kessler Motor & Engineering Corporation. The lease was in writing and expired February 28, 1938. On February 2 or 3, 1938, a judgment by confession upon a promissory note was entered in the Superior court in favor of plaintiff and against Kessler Motor & Engineering Corporation in the sum of 44.885.46. The record of the judgment introduced omits the promissory note, or a copy of the same. The date of the note is not shown. On February 3, 1938, an execution was delivered by plaintiff's attorney to the cheriff of Cook county. On February 25, 1938, a distress warrant was served on Kessler Motor & Engineering Corporation by the Illinois Malleuble Iron Company and possession was taken of certain personal property of the Kessler Corporation. On Pebruary 26. 1938. distress proceedings were commenced in the Municipal court by said landlord against said tenant. On March 5, 1938, forcible entry and detainer proceedings were commenced by said landlord against said tenant. On March 11, 1938, a judgment was entered in favor of the landlord in the distress suit, execution was delivered to defendant, Bailiff of the Lunicipal court, and personal property of the tenant was seized and levied on by defendant. On March 15, 1938, a judgment for possession and rent was entered in favor of the landlord and against the tenant, and on March 17, 1938, execution was delivered to defendant. On March 22, 1938, a sale was held by defendant under the distress for rent execution; also certain personal property of the tenant was seized and a levy made under the forcible detainer execution. On April 1, 1938, a sale was held by defendant under the forcible detainer execution. On spril 20, 1938, defendant was notified for the first time of the existence of plaintiff's execution. The instant suit was filed on April 30, 1938. On May 3, 1938, the sheriff made the following return on plaintiff's execution, "No Property Found and No Part Satisfied."

and lies upon the above described personal property; by virtue of which he has suffered a loss and injury to the extent of the value of the property, namely 1990, for which descrees be brings this sait.

The following facts are undisputed: On February 14, 1936, Illinois Malleable Iron Company leased the premises at 7720-7722 South Racine avenue to Kasaler Motor & Engineering Corporation. was in writing and expired February 18, 1955. On February 2 or 3, 1938, a judgment by confession upon a cromissory note was entered in & rojok releash tanings but Illinials to rovel at jupo rollages and Engineering Corporation in the sun of .4,635.46. The record of the judgment introduced omits the promissory note, or a copy of the seme. The day of the part is not more in the same of the sam was delivered by plaintiff's attorney to the mariff of Cook county. On February 25, 1938, a distress warrant was served on Kesaler Motor. & Ingineering Corporation by the Illinois Halleable Iron Company and possession was taken of certain personal property of the Kesaler Jorportion, to three of the land of the second of the second in the iuricipal court by said landlord against said tenant. On March 5, 1930, freshire miley and debatery presentings are necessarily unid law law agricult and demon, on earth 1990, a judgment one entered in favor of the Lendlord in the distress suit, execution was Lanoaved bas truce legithed the Thilled thebasted of Severife property of the tenant was seized and levied on by defendant. March 15,-1938, a judgment for goodession and rent was entered in favor of the landlers and against the tenent, and on March 17, 1938, execution was delivered to defendent. On March 22, 1938, a sale was held by defendant under the distress for rent execution; also cortain edi tebau ebam yvel a baa berier aw inanej edi to yiregorq lancereq foreible detainer execution. On April 1, 1938, a sale was held by defendant under the forcible detainer execution. On April 20, 1938. -mining to sometaine and to smit the first time of the sittle of the manufacture of the sittle of th no .8881. 30 Lind on belli was tits instead and incides e. 1715. Principle on marter university and the will be to the principle of the pri A position from the most of the fact we produced the The contention of defendant, in the trial court, and here, is that plaintiff lost the lien of his execution by failing to use diligence in enforcing it, and the trial court was evidently of the opinion that the facts sustained the contention. That a creditor may lose the lien of his execution by failing to use diligence in enforcing it is clear. In Freeman on Executions (3d Ed.), Vol. 2, sec. 206, the author states:

with intent to hinder, delay, or defraud creditors, or others, are, as against the persons sought to be hindered, delayed, or defrauded, utterly void. The operation of this statute upon the lien of executions has been the subject of very frequent judicial decisions, and of occasional judicial dissension. According to a very considerable preponderance of the authorities, no actual intent to hinder, delay, or defraud any one need be shown. What was the intent is a conclusion to be drawn from the acts or words of the plaintiff in execution. If what he did or acquiesced in was of a character to hinder, delay or defraud other creditors of the defendant, his attempted use of the writ is, in contemplation of law, fraudulent, and hence no lien or other advantage can result therefrom as against such other creditors, nor even against innocent encumbrancers and purchasers.

"An execution and its lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity toward the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature, and such a perversion from its legitimate purposes as brings upon it the penalty prescribed by the statute of Elizabeth. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet may wish to save himself from all hazard arising from his delay to enforce the collection of his judgment. He is likely, therefore, to take out

The contention of defendant, in the trial court, and here, to that plaintiff lost the item of his execution by fallian to use diligence in enforcing it, and the trial court was evidently of the opinion that the facts sustained the contention. That a crefiter may lose the item of his execution by failing to use diligence in enforcing it is clear. In freezes on inections (3d Ma.), Vol. 2, sec. 206, the sunter states

"By the statute of 13 Minabeth, c. f, exacethous thirm out with intent to hinder, delay, or defraud or ditors, or others, are, as a gainst the persons sought to be hindered, delayed, or defrauded, neverly void. The operation of this statute upon the lies of exacutions has been the subject of very frequent judicial decisions, and of occasional judicial dissension. According to a very considerable preponderance of the authorities, no actual intent to himsey delay, or defraud any one need be shown. That was the intent to himsey delay, to be drawn from the actual or the plaintiff in exacution. If what he did or sequiceed in more of the plaintiff in exacution. If defraud other arealisters of the defendent, his attempted use of the writ is, in contemplation of law, frankulant, and hence no lien or the other advantage can result therefrom as against each other areditors,

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execution with a view to binding defendant's property, but with no intent to make any immediate levy or sale. In other words, he seeks to convert an execution into a mere mortgage. This the law does not tolerate. henever it can be shown that the object of the writ was merely to obtain better security for the debt, it is fraudulent as against subsequent purchasers or encumbrancers, and outranked by subsequent executions. Rarely has this object been proclaimed by the plaintiff in execution. It is inferable from express direction to an officer not to proceed with a levy or a sale, or from any language or course of conduct from which the conclusion may fairly be drawn that the plaintiff did not intend to make his writ immediately productive, but rather to secure the advantage of a lien on the property of the defendant." In support of his statements of the law the author cites a number of cases, including Sweetser v. Matson, 153 Ill. 568, 582, and Everingham v. National City Bank, 124 III. 527, 536.

Plaintiff was a stockholder in the Kessler Motor & Engineering Corporation and his attorney "took care of the records and minutes of the company" from the time that plaintiff bought the stock. Plaintiff's attorney knew that the Kessler company was in financial trouble and that the plant was closed. He testified that after securing the confession of judgment he took the writ to the execution window of the sheriff's office; that he attached to the writ, by a paper clip, a separate piece of paper upon which was written the address of the defendant in the suit; that he handed the writ to the clerk behind the window and the clerk asked him if he wanted it returned nulla bona or if he wanted a lien served, and he told the clerk that he wanted it made a lien and to be served; that he also told the execution clerk that he had been informed that the landlord who owned the building had placed a padlock on the doors of the plant and that so far as he knew there was nobody at the plant; that the clerk told him the fee would be \$2.60 and he paid that arount and got a receipt for it; that he gave the sheriff no other instructions in reference to the writ; that he first learned that the land-

execution with a view to binding defendant's property, but with no intent to make any impediate levy or sale. In other words, he socks to convert an execution into a mere mortgage. This the law does not tolerate, whenever it can be shown that the object of the writ was merely to obtain better security for the debt, it is has around as against subsequent purchasers or enduatrantes. and outranied by subsequent executions. Rerely has this object heen proclaimed by time plaintiff in execution. It is infersble from express direction to an officer not to proceed with a lavy or a sale, or from any language or course of conduct from which the conclusion and salam of brodni for hib Tritalale sat fact owerb se virial yam a to epainsvis only erone of reductive, but rather to secure the education il on the property of the defendant," In support of his statements of the law the author cites a number of cases, including Sweetzer v. Metson, 153 III. 568, 582, and My ILL. SEV. SBA.

Plaintiff was a stockholding in the freship loter a lightness ing Gosporation and his acturary these case of the records and Inutes of the company" from the time that plaintiff bought the stock. Plaintiff's attorney knew that the Massler company was in fand beiliteet en .besolo asw fant ent that bas eldwort isiensaff ent of firm ent about en inomphut, to noteeelnoe ent grituses retis execution window of the sheriff's office; the stracked to wondow notices writ, by a paper clip, a separate piece of paper upon which was bearing at their price out on traderior of to section and negitive mid besies Arele eat bas wobdit edt, baided Arele elt of three with bevose neil a betnew on it or anno allum benruter it betnew of it and he told the clerk that he wanted it made a lien and the cerved; that he also told the execution clark that he had been informed that eroob ent no doolder a becalf had guidling of the own of which all entry Insig odd is ghodon saw erent wend od as ral os indi bas insig edi lo Janora Fair blan on has Od. To see bloom set sets als blet Mrsia self Jail and got a receipt for it; that he gave the sheriff no other instruc--basi and that bearsel farif and tell; the writ; the same and the same

lord had made levies on the property of the Kessler Motor & Engineering Corporation after the levies had been made; that he had known Dr. Wardy for five years before that time; that he did not know the name of the man at the sheriff's office to whom he have the writ; that he doubted very much if he would be able to identify him: that he had had occasion to place other writs with the sheriff before the one in question; "Q. * * * I say you told the sheriff to serve the writ? A. Of course, I did not tell him. He asked me if I wanted it served and I said, 'Yes;'" that he knew at the time that there was no one at the plant of the Kessler company to receive service of the writ; that the address he wrote on the paper attached to the writ was the address of the corporation; that he did not know what officer of the corporation to serve and did not give the deputy sheriff the name of any officer to serve; that he told the deputy sheriff that he did not know who was the president of the corporation.

The original writ was introduced in evidence. It had a large capital "C" endorsed on it. It did not have attached to it. by a paper clip, a separate piece of paper upon which was written the address of the defendant in the suit. No address appears on the writ. Edward McCarthy testified that he was execution clerk at the sheriff's office and had occupied that position for eleven years. The witness, after he was shown a photostatic copy of the writ with the return thereon, testified that the large capital "C" on the writ meant that it was a case writ, that is, a writ to be kept in the files for ninety days unless the attorney came in and signed an order blank to return it to the file; that a case writ "constitutes a nulla bona return at the end of ninety days;" that the writ in question with the return thereon constituted a nulla bona return and the return was put on at the end of ninety days, "at the time of the expiration of the writ;" "Q. This is a case writ, isn't it, Mr. McCarthy? A. That is a case writ; " that a writ is called a case writ where the attorney really does not want it served. The witness was then shown the original writ and after examining it testified that it is a case

lord had made levies on the property of the Messler Motor & Engineering Corporation after the levies had been made; that he had known Dr. Hardy for Tive years before that time; that he did ad more of soffte affired and it mem and to essen and word ton have the writ; that he doubted very much if he would be able to distribution of the had been so the state with the state with which the sheriff before the one in question: "0, * * * I s.y you told the sheriff to serve the writ? A. Of course, I did not tell him. He asked me if I wanted it served and I said, 'Mes;'" that he know granco releas that the rang out to eno on east that the time that the to receive service of the writ; that the address he wrote on the paper attached to the writ was the earlies of the corporation; that the not know what officer of the corporation to serve and did not give oth flot of that; serves of residence to serve; that he told the end to ineblast the day word be not the president three years corroration.

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writ; that he generally has the attorney put the address on the face of the execution; that sometimes the attorneys bring in a slip of paper with the address on it but that he generally takes the slip off and writes the address on the writ. The following then occurred:

"Q. Now, if that writ were to be taken with directions for actual service at 7720 South Racine Avenue, would the fee be \$2.60? A. No, it couldn't be. Q. Couldn't be, that is right, isn't it? A. Yes.

Q. But in the case of a case writ, the writ which is merely to be held for ninety days until it expires, that fee would be \$2.60 as indicated on the writ? A. Right." The witness further testified that if the writ was placed for service the fee including mileage would approximate \$3.50. The writ itself and the sheriff's receipt for fees both show that \$2.60 was paid when the writ was delivered to the sheriff. There is nothing in the record that would warrant an inference that the sheriff acted dishonestly in the matter of this writ.

Plaintiff was a stockholder in the Kessler Corporation and was able to secure from that corporation the judgment note in question. Plaintiff's attorney took care of the corporate books and minutes of that corporation, yet, upon the witness stand he attempted to convey the impression that he was not sure of the address of the plant of the corporation. He testified that he did not know the address of the president of the corporation; that he did not know what property the corporation had in its plant and that he did not know the location of any chattels that belonged to the corporation. He admitted, however, that he told the execution clerk that the landlord had padlocked the premises, and it is evident that he then knew the corporation had defaulted in the payment of the February rent. As a lawyer he knew that the landlord had the right to distrain for rent, yet, after he placed the writ in the hands of the sheriff he never inquired of that official as to the execution of the writ. Defendant's affidavit of defense alleges that plaintiff "had at all times knowledge of levy of the distress warrant and the levy of execution by this defendant, but did not take any steps to make his writ of execution a lien upon the personal property in question." Plaintiff filed no reply to these

the that he generally has the atterney put the address on the face of the execution; that sometimes the atterneys bring in a slip of paper with the address on it but that he generally takes the slip off and writes the address on the writ. The following then occurred: "Q. Now, if that writ were to be taken with directions for actual service at 7720 South Racine Avenue, would the fee be \$2.657 A. No, it couldn't be, that is right, isn't it? A. Yes.

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allegations. On Pebruary 25 the landlord seized certain property of the corporation, and proceedings in forcible detainer and distress for rent were instituted against it. On March 11, 1938, the bailiff took possession of certain personal property of the corporation. On March 22, 1938, another levy was made by the bailiff. Two sales of the personal property of the corporation were held by the bailiff. We must presume that the property was sold pursuant to the notice and advertising that the law requires, yet, during all this time plaintiff did nothing to enforce his judgment. The Bailiff, a disinterested party, had no reason to hinder plaintiff in the assertion of his rights, and had no knowledge of plaintiff's claim until April 20, 1938, which was almost one month after the first sale, and nineteen days after the second. By April 20 the sales had been consummated and there was nothing that the Bailiff could do to aid plaintiff in enforcing his rights. There is much force in the contention of the Bailiff that plaintiff or his attorney must have known of the steps taken by the landlord to enforce its lien. There is also force in the contention that plaintiff and his attorney knew where the corporation property was to be found, yet took no steps to levy on it. Plaintiff's attorney testified that he did not tell the sheriff to make a levy but only to make his writ a lien and serve it.

We are satisfied that under the evidence in the case and the law, the trial court was justified in finding for defendant.

In this court the appellant, Dr. T. E. Hardy, and Herman Wepman, as assignee of said appellant, have filed a motion, supported by an affidavit, for the entry of an order that Herman Wepman be substituted in the cause for the appellant and that all orders and judgments hereafter entered herein be in the name and behalf of or against said Herman Wepman in lieu of Dr. T. E. Hardy, the original plaintiff and appellant. The motion was allowed.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

logations. On February 25 the Landlord seased contain accounty of the corporation, and proceedings in foreible detainer and distress for wood Trilled ont . 3f 9f . 11 down no . it is along be to tree inch the control to the control t possession of certain personal property of the corporation. On March 22, 1918, conform lavy was made by the bulliff, You nake of the prosome . This is not the surpression was hald by the being as a most -corts has colden out or transcent false are afrecorn out rack prevent tising that the law requires, yet, during all this time plaintiff did nothing to enforce his judgment. The Mailiff, a disinterested party, had no reason to hinder plaintiff in the assertion of his rights, and had no knowledge of plaintiff's claim until torti 90, 1938, which was salt rette eyab maetenin ins lales terif ent rette atmom one tromis second. By April 20 the sales had been consummated and there was ald amboroine at Thinial bis of ob blues Thillast ent tadt galdion rights. There is much force in the component of the Bailiff that plaintiff or his attorney must have known of the steps taken by the landlord to enforce its lien. There is also force in the contention througher, such oranges not sends used paracrait and has thattained dads was to be found, yet took no steps to lavy on it. Plaintiff's attorney of vino dad yvel a salam of Thirada only lied you hib od tadd beilliteet alle wit a lien and cerve it.

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In this court the appellant, Dr. T. E. Mardy, and Merman Weyman, as assignee of said appellant, have filed a metion, supported by an affidavit, for the entry of an order that Merman Weyman be substituted in the cause for the appellant and that all orders and have ments bereafter enter the file of the cause of the said that all orders and have and appellant. The motion was allowed.

The judgment of the first appearant affiliant.

Friend, P. J., and Sullivan, J., concur,

40841

Appellee,

V.

NEW YORK LIFE INSURANCE COMPANY, a corporation, Appellant. APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

307 LA. 381

MR. JUSTICE SCANLAR DELIVERED THE OPINION OF THE COURT.

Plaintiff, beneficiary in a policy issued by defendant, sued to recover the additional double indemnity benefits of \$3,000 on the life of William J. Kropacek, her brother. The policy was in force at the time of death and defendant paid its face value, \$3,000. A jury returned a verdict finding the issues for plaintiff and assessing her damages at \$3,175. Defendant appeals from a judgment entered upon the verdict.

The double indemnity clause of the policy provided:

"The double indemnity * * * shall be payable upon receipt
of due proof that the death of the Insured resulted directly and
independently of all other causes from bodily injury effected
solely through external, violent and accidental means * * *.

"Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether same or insume * * *; or directly or indirectly, from infirmity of mind or body, from illness or disease * * *."

The insured died on December 27, 1937, of "a crushing injury to the head" as the result of a "fall" or "jump" from an archway window on the third floor of the Peoples Hospital to the sidewalk below. The hospital is located on Cermak road and Archer avenue, Chicago. In plaintiff's statement of claim it is alleged: "On or about December 27, 1937, while said policy was in full force and effect, said insured received personal injuries through external, violent and accidental means, to-wit: by accidental fall three stories from a fire-escape to the ground." Defendant's

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answer to the foregoing, in its pleading, is as follows: "The defendant denies that said death was the result of external, violent and accidental means and in particular denies that said death was the result of an accidental fall from a fire-escape and avers that said death resulted from self-destruction while said insured was sane or insane and, hence, was not a death within the meaning of the double indemnity provisions of said policy or contract upon which the plaintiff sues." After verdict plaintiff was allowed to amend her pleading by striking the words "by accidental fall three stories from a fire-escape to the ground," and to insert in place thereof the words "by accidental death immediately caused and resulting from a crushed head accidentally received and suffered and not self-inflicted while sane or insane."

Plaintiff introduced the policy and a stipulation that the immediate cause of the death of William J. Kropacek was "a crushing injury to the head," and rested. Defendant's evidence is, in substance, as follows:

F. C. Francis testified that he was the head of the passenger traffic department of the Rock Island Railroad and that the deceased had been working in his department since 1921; that in December, 1937, he sent the deceased to Omaha on business for the company; that the deceased was taken ill there and was unable to stay the number of days necessary to do his work; that on the evening of December 23, 1937, he went to the home of the deceased and talked with the latter, who was then in bed; that he "sat down by the bedside and talked a little bit" with Kropacek "about his trip to Omaha;" that Kropacek told him that "he had been taken ill in Omaha, had consulted a doctor and that he felt so miserable or ill that he decided it was best to come back to Chicago," and that he returned to Chicago on the morning of the 22d; that he questioned Kropacek "about the nature of his illness and apparently his stomach was upset and his nerves, and one thing and another, but he told me that he had something on his mind that had bothered

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him a great deal and he could not sleep and I asked him what it was. He said he could not tell me nor anybody. I asked him if it was something in connection with the work at the office and he said. 'No. nothing like that; something personal;'" that he said to Kropacek. "Well, if you won't tell me about it, can you talk to your brother or sister or your mother?" that Kropacek said, "No, it is something I can't talk to anybody about;" that he then asked him what his religion was, and he said he was a Catholic, "so I advised him that if he couldn't talk to any members of his family or me, to send for his priest and have him come over and have a talk with him," to which Kropacek answered, "Well, that's an idea;" that he began to give Kropacek some advice "about taking care of himself, keeping in bed, and keeping warm and eating lightly," and so forth, and he said he would; that Kropacek said he "had something on his mind that affected his well-being so to speak, so he could not sleep and he was worried;" that "after the conversation drifted around I said. 'You keep in bed and keep warm and eat lightly and you ought to be able to get through this and come back to the office next Monday. And he said, 'No, I will never be back.' I thought that was just an idea due to his condition and so I tried to cheer him out of that and he said, 'No, I am through.' I said, 'Why do you think that? ' Well, ' he said, 'my ticker' - and he tapped his heart."

Dr. Roland P. MacKay testified that he specialized in diseases of the nervous system; that he graduated from the University of Toronto Medical School in 1925 and interned at the Henry Ford Hospital from 1925 to 1926; that he "was a fellow in neurology in the Mayo Clinic from 1926 to 1929;" that he came to Chicago in 1929 and associated with Dr. George W. Hill; that he spent one year in post graduate work in Germany in 1932 to 1933; that he was a member of the American Neurological Association and was certified as a specialist in neurological and psychiatric diseases by the Psychiatric Board of the American Neurological Association, that

fi fade whi bedes I has goels for bluce of has leeb forg a whi it li mid beset . . we nor employ I soked him of it it was something in connection with the work at the office and has bise ad tadi "! : Lamoured guidismos ; Jadi sail gaidion . od! . Sias to Propagal, "Wall, if you won't tell me about it, can you talk . Alsa desegond tadi "Fredion moy to retale to rediend may of "wi fail " the something I can't talk to anyhody about; " that he then coiced him what his religion was, and he said he was a Cathelic, aid to aredness the or alst tembles of it tadt ald besives I or" family or me, to send for his priest and have him come over and have "tesh us a fadt , lish" berevers desegorn doide of " ald it which to suso mained duode" salves some mosegori evin of named ed tadi himself, keeping in bed, and keeping warm and cating lightly," and so forth, and he said he would; that Kropacek said he what concining on his mind that affected his well-boing so to speak, so be could heilirb noiserevos edi refler that "theirrow ass ed has geels den around I said, 'You keep in bod and keep warn and est lightly and you ought to be able to get through this and come back to the office next Monday. And he said, 'Mo, I will never be back.' I thought resolo of heirs to be smithenes and of sub subi as faut any fall ob vall' , hiss I '. Aguard' was I cold' , bles of bus that to tuo mid you think that? ! "Well, ' he said, 'my ticker' - and he tapped his Walley Co.

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he was "senior in neurology at St. Luke's Mospital" and an associate professor at the University of Illinois; that on Junday December 27 [26], 1937, the day before the death of Kropacek, he was called as a physician to the Kropacek home about two o'clock p.m. and found Kropacek in bed in the front room upstairs; that he made an examination of him at that time, and that present during the examination were two or three brothers of Kropacek, "perhaps a sister, and I think his mother;" that after he had talked with Kropacek for a few minutes, "or tried to," he "carried out a neurological examination on him, that is, a physical examination with special reference to any disturbance of his nervous system; " that he examined "all those functions of the body that the nervous system carries out, such as pupillary reactions, the presence or absence of muscular power in various parts of the body, presence or absence of various reflexes that are normally found, and the existence of normal or abnormal sensations anywhere in the body;" that he examined the patient's mental condition; "Q. What did you observe as to Mr. Kropacek condition as a result of his examination? A. When I saw him he was in a very acute stage of agitated depression. He was restrained with difficulty. He wanted to get up out of bed all the time. He was very agitated and restless, wringing his hands and crying, bemoaning his fate, and stating there was no hope for him and that no matter what might be done for him, he was finished." The doctor further testified that he explained the condition of the patient to his family "and pointed out he was in danger of sulcide because of his depressed mental condition. * * * Because of my opinion as to his condition I prescribed * * * that he should be taken to the psychopathic hospital where he could be protected from himself." Upon recross-examination, after the doctor stated that he did not make out a physician's affidavit for admission to the psychopathic hospital, he asked to be allowed to state his reasons why he had not made out such an affidavit, but upon objection by plaintiff's counsel he was not allowed to do so.

he was "senior in neurology at St. Lake's sognifican and an associate professor at the University of Illinois; that on Sunday December 27 [25], 1937, the day before the death of Kropacek, he was called as a physician to the Archaesk home about two o'clock p.m. and found fromeon in bed in the front room unsuring that gairph thosory tedt bas , out that the aid to noticalesse as oben ed the somitables our two or three bollers of Dennist, "or and dibs belief and of rette that the teller and think black at the Kropscek for a few minutes, "or tried to," he "carried out a neurological examination on him, that is, a physical examination with special reference to any disturbance of his nervous system: that he examined "all those functions of the body that the nervous system carries out, such as pubillary reactions, the presence or absence of muscular rower in various parts of the body, presence on absence of verticus refleres that are normally found, and but " tybod out at enchance anotherner Lemronde to Lemron to conestains that he examined the patient's mental condition: "S. od observe as to Mr. Kronacek condition as a result of his examination? A. Then I saw him he was in a very acute stage of agitated depression. He was restrained with difficulty. to get up out of bed all the time. He was very agitated and restless, winging his hands and orging, benoaming his face, and stating timere was no hope for him and that no metter what might be done for him, he was find shed, " The doctor further testified that he explained asw of two beinjos bear willing and of the retired ent le notifice ent in danger of suicide because of his depressed mental condition. * * Because of my opinion as to his condition I prescribed * * * that he should be taken to the psychopathic hospital where he could be protect from hims ill." Upon reconsecuting tion, of the time decision stated that he did not make out a physician's efficient for admission the psychopathic hospital, he asked to be allowed to state his reasons why he had not made out such an affidavit, but upon objection by plaintiff's counsel he was not allowed to do so.

Joseph Kropacek, a brother of the deceased, testified that at the time of the death of the deceased he lived at 3135 Mormal avenue, where the witness also lived; that lilliam was thirty-one years of age, single, and a Catholic; that he had been ailing for several years; that his sight and hearing were good; that he was about five feet, eleven inches in height and weighed about 160 pounds. "O. What did you observe as to his mental condition * * * just prior to his death. A. Well, he went to Omaha. I noticed it after he came back from Umaha;" that after he came back "I couldn't observe much of anything;" that he told the witness "he had been overworked and was awfully nervous and could not sleep nights; that "he hadn't slept for about a week or two;" that the last time he saw his brother alive was Sunday afternoon at the Peoples Hospital: that William had not been in any institution for mental disorders: that the doctor suggested that William be taken to "Mercyville Sanitarium." "Q. Now, what was this condition you observed that caused you to call in Dr. Eackay and Dr. Gilbert? A. Dr. Gilbert suggested Dr. MacKay. He didn't know what was wrong at the time. * * * 0. * * * That happened on that night [24th]? A. Well, he did ask me for a gun. That is what he asked for. Q. Yes. A. But, if he had any intentions of using it, he had it himself. Q. Yes. Now, did you have to use restraint on him during this Junday to quiet him down? A. Well, he tried to run out of the house several times and I called my brother-in-law from across the street to take him back in the house. I did mention that at the Peoples Mospital. that he will try to run out of the place, and told them to watch him." Upon cross-exemination by plaintiff's counsel the witness testified that at the time that William asked for a gun he had the gun himself in his drawer and he had the key in his pocket; that on that same day the witness left the house and was gone for two hours, during which time william was alone in the house; that in the house there was also a rifle that William used when he went hunting; that the witness did not

Joseph Wropscell, a bnother of the decesed, testifica THE is bowlf on ben weed out to discub out to balt out in lad car mailiff Janit ; boulf oals assurbly one overto, encove _ _ _ _ tidrty-one years of ago, single, and a Catholie; that he had been that for several years; that his state and partia were good; that ine was about five fact, elected actual nevel just swil juods auw on 160 pounds, "Q. What did you observe as to his mental condition I will said to his death. A. Hell, he wont to Caplan. motion it efter he came biek from unahar" that after he came bed " couldn't observe much of anythings" that he told the witness goele dan blood one actvilly networks and barloom one dad ed" not paid "good on most a mode not reads at that on' dust padelts end to nocarethe waters and evila restord all was of emit tual Peoples Hospital; that billiam had need in emy incitation ad martified dadit betweenes recover and teat terebrath letma re's taken to very the deal and are a server of the server of the server of you observe that will be the common your in the call of the count aid the time of the property of the property of [24th]? A. Well, he did ask me for a gam. That is whet he asias for . Q. Yes, i. hat, If he had not investigat of writer this day were to very bid you have to were to the day to on him during this Sunicy to quiet him down? A. "ell, he tried wal-mb-restord we believ I has somed fareves eased and to Jue mur of moisses the street to take with the boars. I die mantien the to the root of the hand on the particle of the ball of place, and told them to match him." Upon cross-exactlention by full outs of its full inthinest smooth bit Joseph a Milliabilly has reward ald at Menaid any east bad and any a rol besies wailling he had the legt to his postery that but the silver either eitheres left the house and was gone for two hours, during which time William was along in the house, that is not make there were also a wide for bid evently ent tant ; unitical thew on new been maillist tant think much of the statement made by his brother regarding a gun, as he figured that if billiam wanted the gun he could have got it himself and could have used it at any time he wanted it; that william "had a priest" on the Thursday afternoon before he died; that the witness did not notice anything unusual "about his head" on December 26; that william was satisfied to be at the hospital, that he called them up about seven o'clock and said "we should not worry, that he had two nurses, two blonds nurses taking care of him."

Peoples Rospital. These photographs and certain other evidence show that the hospital is a Four-story building that faces north on Cermak road, or 22d street; that on the third floor is a corridor which opens out onto a porch that covers the entire east end of the building; that the porch is about eight feet in width and has a floor of corrugated or rough steel "with notches in it;" that it has a fire escape at the south end and an archway window at the north end; that the bottom ledge of the archway window is three feet, three or four inches, from the floor of the porch; that the concrete block which forms the bottom of the archway window ledge is fourteen inches across; that the distance from the bottom of the archway window to the sidewalk below is thirty feet, two inches; and that the width of the sidewalk directly opposite the archway window, on the 22d street or Cermak road side, is sixteen feet, four or five inches.

A police officer who responded to a call a few minutes after seven o'clock in the morning, testified, inter alia, that he observed the condition of the sidewalk upon his arrival at the scene of the death and found that the sidewalk had been washed off with water at a point opposite the window opening and he saw there some dark red stains which were not all washed off; that the distance between the point where he observed the blood and the wall of the building was about fourteen feet; that the body of the deceased had been removed from the sidewalk before the witness arrived; that

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the janitor of the hospital showed him where he found the body, it was "where this water was lying."

The superintendent of nurses at the hospital, Jean Adams, testified that she resided at the hospital; that she admitted Kropacek to the hospital; that his brother Joseph brought him there; that William was assigned to room 304 on the third floor, which room is in the middle of the hospital: that she talked with the patient at the time of his admission; that she thought he looked just like any other patient; that after the patient asked her, "Would it be any trouble to get a priest for him," she got a priest for him during the afternoon; that the priest left and later in the evening she had a talk with Kropacek in his bedroom and ordered an enema for him: that after he had been given the enema he felt better and was quite cheerful, but stated that he did not think that he was going to sleep that night, and after supper she "ordered a sedative for him by doctor's orders. He got two allonal tablets;" that Kropacek "had a quiet evening," as far as she knew; that she heard him say over the telephone that he liked the nurses and that they were nice to him; that she saw him last about 10:30 o'clock at night; that she saw him next on the morning of December 27, at which time he was dead; that she observed his head was all smashed in. Upon cross-examination the witness testified that there was a fire escape on the porch and that the words "Fire Escape" appeared on the door leading to the porch; that the brother of the deceased requested that he be assigned general duty; that there were two or three toilets on the third floor, one directly opposite the patient 3 room; that there was one window in the patient's room and she thought that it was shut at all times.

The houseman of the hospital, Peter Krolikowski, testified that about seven o'clock Monday morning, December 27, 1937, the witness, after hearing "hollering," "ran outside and looked on the walk and seen the patient lying there;" that at the east end of the hospital on the third floor there is a porch; "that after you step

the janitor of the hospital showed him where he found the body, it was "where this water was lying,"

The superintendent of nurses it the hespital, Jean Adams, Secritors are their introduced and he beddeen one from Authorities enend win injured deere, newtond aid tent alstone out of Assequen meor rights, was resigned to rose 304 on the third floor, which repair the it to enthat beatlet one tadt : [stigzon ent to elibla ent at at alti faut hedool ed flewedt ede that the sent to enit edf te ed it bluod" , and beside and the tent and the tent of any trouble to get a priest for him," she got a priest for him the afternoon; that the ordest left and later in the evening tot agene as bereits and solved this lease of the list a bad enter saw has cotted first end seems out movin need bad ad totte this gaing sow of teris whilst for bib of teld betata tad lutreon's ethup to sleep that might, and efter supper she "ordered a sedative for him by doctor's orders, He got two allonal tablets; " that Kropacek yes mind a quiet evening." as Tar as which that also been min asy ere the telegraphe that le this entrace and that they were thrin is noofe'o Of toll tweds had mid was she that this of sola that she saw him next on the morning of December 27, at which time he was doad; that she observed his head was all smarked in. Urdn equally will a six enoil that helf-like blocks and maly and members good end to be recept "escape" ascape that that the porch on the door on the leading to the perch; that the brother of the decessed requested the be assigned general duty: that there were two or times Einelteg sat etizogo glassath and . wooll brint ent no eteliot room; that there was one window in the patient's room and she .semit ile is tune asw il tant theworld

out on the porch and turn to your left you walk right over toward 22d street and come to a ledge or archway: "that the distance from the door to the archway was fifteen feet, eight inches; that the distance from the porch floor to the bottom of the window ledge is three feet, two inches, and the distance across that window ledge is one foot, three inches; that "the distance straight down according to my measurements was thirty feet, one inch;" that the distance from the side of the wall of the hospital to the curb is sixteen feet, five inches: that when he saw the body of the deceased it was "laying on the walk. It was fourteen feet two inches north of the hospital. It was about in the center of the archway;" that when he reached the body he saw that the deceased "had on a night gown" that "was pulled all the way up to his neck. He was all exposed." and the head was facing west; that the witness measured the distance from the body to the curb and found it was two feet, two inches; that there was no water on the sidewalk when he picked the patient up and the myement was dry; that after they brought the body of the patient into the hospital the witness washed that part of the sidewalk where he had found the body.

Defendant contends: "Under the terms of the double indemnity clause which provides that the defendant shall not be liable for death resulting from 'self-destruction, whether same or insame,' the law is well established in Illinois that the defendant is not liable if the insured died from self-destruction either as the intentional act of a same person or the act of an insame person motivated by some insame impulse or totally unconscious of the nature and character of his act. Under such a clause the degree of samity or insamity does not preclude the defense of self-destruction." This statement of the law does not seem to be disputed by plaintiff. In any event, it correctly states the law of this State.

Defendant strenuously contends that under the facts of the case the only reasonable hypothesis is that the insured, whether he was same or insame, came to his death by self-destruction, and that the trial court erred in failing to direct a verdict for defendant

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out on the porch and turn to your last you welk right over wowerd 22d street and come to a ledge or archway;"that the distance from . the door to the archwey was fifteen feet, cight inches; that the al arbel wobalw ent to mottod ent of though the troub some at the three feet, two inches, and the distance across that window ledge is one foot, three inches; that "the distance straight down scording to my measurements was thirty feet, one inch; " that the distance from the evil . teel maintain al drug out of letigned but to the wall of the mo gaival" saw il becassed and to whod and was an andw Jah; second the walk. It was fourteen feet two inches north of the hespital. It was about in the center of the archway;" that then he reached the bedy ile bellug saw" that town thish on a might gown that the saws pulled all the way up to his neck. He was all exposed," and the head was facing drug of the the witness measured the distance from the body to the curb end no refer on ear event tout; seenoni owl, teel owl as it bout bas failt tyrb com incomeration out for in the contract of noise alloweble -liw and latigeon and cink insites and to whod sut integral went raths ness washed that part of the sidewalk where he hed found the body.

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 at the close of all the evidence. Thile this contention is strenuously and ably argued, we are satisfied that it is our duty under the law to hold against it. "A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and that rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence. - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297. Italics ours.) See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. 586, 597. In the light of this rule of law, we are satisfied that it is our duty to hold that the trial court did not commit reversible error in refusing to instruct the jury to find for defendant at the close of all the evidence.

Defendant contends that, in any event, the verdict of the jury is manifestly against the weight of the evidence and therefore the trial court erred in denying defendant's motion for a new trial.

This contention, in our judgment, is clearly/meritorious one. As this case will probably be tried again we refrain from analyzing and commenting upon the facts and circumstances in evidence. Counsel for plaintiff, in support of their argument that Kropacek's death was accidental and that the verdict of the jury is not manifestly against the weight of the evidence, contend, in this court, that the predominating factor in producing the insured's death was probably the two allonal tablets that the nurse gave Kropacek.

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Plaintiff argues that "there is no evidence that the insured ever took Allonal or any like drug before, and we submit that the purpose and the initial affect thereof was to induce sleep, but that under the influence of this drug, he not having taken the same before, that the further effect of the same would be to impair the normal functions of the insured's brain and muscle impulses, so that he could not concentrate enough to commit suicide which could reasonably have been the predominating factor that the insured's death was accidental, and could reasonably have brought about a misstep, misadventure or accident resulting in insured's death, as found by the jury and sustained by the court." Plaintiff further argues that "the brain impulses, and the muscle impulses of the insured were interrupted, and that the insured could have functioned by 'sub-conscious mind, due to the effects of this drug, both before and immediately leading up to the acts and occurrence of his death." The only evidence in respect to the allonal tablets is the testimony of the head nurse, Jean Adams, that after Kropacek had told her that he did not think he was going to go to sleep that night she, "by his doctor's orders," ordered as a sedative for him two allonal tablets. Plaintiff's able counsel thought so little of this evidence when it was given that he did not cross-examine the witness in reference to the allonal tablets. There is not a word of evidence in the record that tends to support plaintiff's argument as to the nature and effect of these tablets. In plaintiff's brief, counsel, in support of the argument that we would have a right to conclude that the cause of the death of the insured was due to the taking of the allonal tablets, have not hesitated to go outside of the record. If the two allonal tablets could have had the effect on the deceased that plaintiff now argues, there was a proper way to show that fact.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Sullivan, J., concur.

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The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE RESAMDED.

Friend, P. J., and Sullivan, J., ement.

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PEOPLE OF THE STATE OF ILLINOIS ex rel. Oscar Nelson, as Auditor of Public Accounts of the State of Illinois,

UNION STATE BANK OF SOUTH CHICAGO et al.

JULIUS F. SMIETANK as Trustee. (Intervening Petitioner) Appellee.

V.

CHARLES H. ALBERS, Receiver of the Union State Bank of South Chicago, (Respondent) Appellant.

APPEAL FROM CTRCHTT COURT OF COOK COUNTY.

307 L.A. 3821

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A liquidation suit of the Union State Bank of South Chicago was pending in the Circuit court of Cook county. An intervening petition was filed in said suit by Julius F. Smietanka, as trustee under three certain trust deeds, which petition asked the court to direct Charles M. Albers, receiver of said bank, to pay to said petitioner certain moneys claimed to be due the petitioner for court costs, expenses, attorneys' fees and master's fees incurred or expended by the petitioner as plaintiff in the foreclosures of the three trust deeds, which secure three series of notes, a portion of each series being owned or held by said receiver. The receiver filed an answer denying that the petitioner was entitled to payment from the assets of the bank. After hearing evidence the trial court on March 28, 1939, entered an order directing the receiver to pay the amounts asked for by the petitioner. The order further provided that the receiver, upon the payment of said amounts, "shall be and he is subrogated to the rights and privileges of the said Julius F. Smietanka, as trustee, plaintiff, acquired by him under the

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UNION STATE SAID, O SUBTE CATO CO.

JULIUS P. SKINIAMA, C. D. Coles, (Intervening Peticioner)

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APPEAL PROM CINCUIT COURT
OF COOR COUNTY.

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MR. JUSTICE SCANLAN DELIVERED THE OFFICEN OF THE COURT,

stress to some state makes are to them makes handle A Chicago was rending in the Circuit court of Cook county. in intervening petition was filed in said suit by Julius F. Saictanka, as end bester under three certain trust deeds, which patition content yag of , and blas to reviews, readly and the to pay renoilities ent out ed of bemisle evenou mistere cettitone biss of for court costs, expenses, attorneys' fees and marter's fees incurred end to encure of the petitioner as plaintiff in the forestores of three trust deeds, which secure three series of notes, a portion of sach series being owned or held by said receiver. The receiver filed morl frame denying that the petitioner was entitled to payant me the assets of the bank. After hearing evidence the trial court on March 28, 1939, entered an order directing the receiver to pay the bebivorg real for by the petitioner. The order further provide that the receiver, upon the payment of said smounts, "shall be and he is subregated to the rights and privileges of the seat of being order is elities, as trustee, plaintiff, acquired by him under the

respective decrees entered in said cases, to a first and prior lien for such advances for said legal services, costs, and Master's fees."

The receiver of the bank appeals from the order.

The verified intervening petition recites:

- "1. That the Union State Bank of South Chicago, an Illinois banking corporation, suspended business on September 18, 1931, and because thereof the above entitled suit was started and Frank M. McKey was duly appointed Receiver of the assets of said bank.
- *2. That said bank negotiated from time to time loans secured by mortgages on real estate and the borrowers conveyed their equities in the form of a trust deed to Julius F. Smietanka, Trustee, the petitioner herein, and Courtney R. Merrill, Successor in Trust; that the indebtedness was evidenced by a single note for the amount thereof or a series of notes with interest coupons attached; that in the course of business such notes were sold to persons desiring to make real estate loan investments.
- "3. That among such loans so negotiated by said bank were the following:
 - "A. John Sinila and Alexandra Sinila, his wife on the 27th day of November, 1928, for the sum of \$17,000.00, evidenced by eight (3) principal promissory notes and secured by a trust deed on the property known as 9800 Escanaba Avenue, and legally described as: [Here follows legal description]
 - "B. Wellington B. Mitchell and Mary Mitchell, his wife, on the 25th day of March, 1925, for the sum of \$6500.00 evidenced by seven (7) principal promissory notes and secured by a trust deed on the property known as 9710 Avenue J and legally described as:
 [Here follows legal description]
 - "C. George Starcevich on the 18th day of September, 1929, for the sum of \$4500.00 evidenced by two (2) principal promissory notes and secured by a trust deed on the property known as 10400 Avenue N and legally described as: [Here follows legal description]
- "4. That there came into the possession of the said

 Frank M. McNey, as such Receiver, as part of the assets of said defunct

 bank, of the notes described in the foregoing paragraph, the following:

respective decrees entered in seld eases, to a first and prior lien for such advances for said legal services, costs, and laster's foos."
The receiver of the bent appeals from the order.

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wife, on the Zyth day of march, lyth, for the sum of th

"d. Onaryo thereeriah on the little day of deptember, 1913, "or the exact of the fee fail 1913, "or the exact of the fee fail related at the control on the present dead on the present the fail the fee fail and the little day.

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nunk, of the notes described in the foregoing paragraph, the following:

"John Sinila "Wellington B. Mitchell "George Starcevich \$7000.00 3000.00 1400.00

"5. Because of the default in the payment of said notes, the said Frank M. McKey, Receiver, made a request upon your petitioner, as such Trustee so designated in said trust deeds, to file foreclosure proceedings in each instance, pursuant to the powers vested in said Trustee by the terms of said Trust Indentures, and accordingly petitioner hired counsel to proceed in accordance with such direction, and suits were started and entitled as follows:

"'Julius F. Smietanka, Trustee vs. John Sinila, et al., Circuit court case numbered B-239060;

"'Julius F. Smietanka, Trustee vs. Wellington B. Mitchell, et al., Circuit Court case numbered B-235663;

"'Julius F. Smietanka, Trustee vs. George Starcevich, et al., Circuit Court case numbered B-238341.

- "6. That said proceedings terminated in a decree and pursuant to the provisions thereof on the respective days of sale by the Masters in Chancery to whom said causes were referred, there being no cash offers at said sales, Julius F. Smietanka bid the amount of the indebtedness due and owing to him as such plaintiff Trustee.
- "7. That reports of sale submitted by the Masters in Chancery were in each instance approved by the Court and certificates of sale were issued by said Masters of the properties so sold to the said Julius F. Smietanka, Trustee.
- "8. Petitioner further represents that in order to bring this litigation and to pursue it to a conclusion, it became necessary for him as such Trustee to hire counsel, to advance costs and obligate himself for Master's fees and charges, none of which have been paid to him.
- "9. That during the pendency of the receivership proceedings a change of Receivers was effected from time to time and lately Charles H. Albers is acting as such Receiver of the said Union State Bank of South Chicago; that the said Receiver was well-acquainted with the

"John Sinila "Wellington B. Fitchell "George Starcevick

3600.00 3600.00 1406.00

"J. Because of the default in the paparent of said notes, the said Frank M. McMey, Receiver, made a request upon your petitioner, as such Trustee so designated in said trust deeds, to file foreclosure proceedings in each instance, parsuant to the powers vested in said Trustee by the terms of said Truste Indentures, and accordingly petitioner hired counsel to proceed in accordance with such direction, and suits were started and entitled as follows:

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"Julius F. Smictanks, Trustee vs. John Sinila, et al., Circuit court case masbered B-230000;

"Julius P. Smistanks, Trustee vs. Wellington B. Mitchell, et al., Circuit Court case numbered 5-237663;

"Julius F. Smietanks, Trustec vs. George Starcevich, et al., Circuit Court case numbered R-238341.

to the provisions thereof on the respective days of sale by the Macters in Chancery to whom said causes were referred, there being no each offers at said sales, Julius F. Smietanka bid the anount of the indebtedness due and owing to him as such plaintiff Frastes.

"7. That reports of sole submitted by the desters in Chancery were in each instance approved by the Court and certificates of sale were issued by said Masters of the properties so sold to the maid made .

"3. Petitioner further represents that in order to bring this litigation and to pursus it to a conclusion, it became necessary for him as such Trustee to hire counsel, to advance costs and obligate district or a residual to the confession of which have been paid and the

"9. That during the pendency of the receivership proceedings cannot be a set of the seid Union State Bank of the Seid Union State Bank of the Chicago; that the Said Receiver was well-acquainted with the

steps being taken in said foreclosures and from time to time informed by this petitioner of progress being made.

- "10. That statements of the services performed and disbursements made incident to said litigation as aforesaid have been submitted to the said Receiver on several occasions since October 8, 1937, with no specific objection to either of them, copies of which are hereto attached and made a part hereof.
- "Il. That said charges, with the exception of those made for Trustee's fees, have been approved upon proper presentation to the Court.
- "12. That the petitioner himself did not perform any of the legal services, but hired counsel therefor and is obliged to pay the same; that such are fair, reasonable and the ordinary fees customarily recognized in Chicago as fair and reasonable for like services performed.
- "13. That likewise the charges made for the fees of the Trustee are fair and reasonable and the customary charges made for services similarly performed as outlined herein and otherwise rendered without specifying the same in detail.
- "14. Petitioner further alleges that there is due him as such Trustee plaintiff in said cases the following amounts:

"Smietanka vs. Sinila - \$1770.90 "Smietanka vs. Mitchell - 854.15 "Smietanka vs. Starcevich - 523.51

as of the dates mentioned in the attached statements, reference to each is hereby made for particulars of the services rendered.

"Wherefore, petitioner prays judgment that the said Charles H. Albers, Receiver of Union State Bank of South Chicago, pay unto the petitioner the respective amounts herein set forth; that said Receiver be ordered to make answer within a short day to be fixed by the Court, and such other and further relief as to the Court may seem meet."

Attached to the petition were statements that the costs, cash advances, attorneys' fees and master's fees expended or incurred by

steps being taken in sald foreclosures with from time to time informed by this petitioner of progress being make.

"10. That statements of the services performed and disursements made inclaent to said litigation as aforestid have been submitted to the said Maceiver on several eccasions since October 3, 1937, with no specific objection to either of them, copies of which are hereto attached and made a part hareof.

"11. That said charges, with the exception of those made for Trustee's fees, have been approved upon proper presentation to the Court.

'12. That the petitioner himself did not perform any of the legal services, but hired command therefor and is obliged to pay the same; that such are fair, reasonable and the ordinary fees customarily recognized in Chicago as fair and reasonable for like environment.

"II. That Illiandes was marged made for the field of the

Trustee are fair and reasonable and the sustemary charges made for services similarly performed as outlined herein and etherwise rendered without part of the services and characters.

such Trustee plaintiff in eath caces the following amounts:

as of the dates mentioned in the attached statements, reference to each is hereby made for particulars of the nervices rendered.

"Therefore, petitioner prays judgment that the said Charles
H. Albers, Receiver of Union State Bank of South Chicago, pay unto the
Lieur the time to the answer within a short day to be fixed by the Court,

and such other and the petition were statements that the cost, and

the trustee in each case are as follows: Smietanka, Trustee v. Sinila et al., \$1,770.90; Smietanka, Trustee v. Fitchell, \$354.15; Smietanka, Trustee v. Starcevich et al., \$523.51.

The verified answer of the respondent states, inter alia: "This respondent alleges on information and belief that none of his predecessors in office ever employed the firm of Smietanka, Comlon and Knaus to file the foreclosure suits as set out in said intervening petition and denies that he, as receiver of the Union State Bank of South Chicago, ever employed said firm of Smietanka, Conlon and Knaus to file the said foreclosure suits and avers that said Julius F. Smietanka caused proceedings to be instituted without advising this respondent of so doing and said respondent neither admits nor denies that any notice of the filing of said proceedings and any demand for the filing of said proceedings was given or was made upon his predecessors in office and calls for strict proof of any notice or of any demand. * * * Avers that he at no time authorized Julius F. Smietanka, as trustee, to institute the aforesaid foreclosure proceedings, that said Julius F. Smietanka instituted said proceedings by virtue of the powers granted to said Julius F. Smietanka in the respective Trust Deeds: that under the terms of said Trust Deeds the charges of the attorneys for said trustee became a lien on the real estate foreclosed and that said firm of Smietanka, Conlon and Knaus, under the terms of the respective trust deeds are obligated to look to the real estate conveyed by said trust deeds for their security for their fees, as attorneys for said trustee."

Union State Bank of South Chicago was closed in September, 1931, by the auditor of public accounts of the State of Illinois. Frank M. McKey was appointed receiver of the bank and as such receiver he had in his possession the following: A total of \$7000 of mortgage notes signed by John Sinila and his wife, which notes were part of an issue of \$17,000 secured by a trust deed to Julius F. Smietanka, as trustee, conveying certain real property. A total of \$3,000 of mortgage notes signed Wellington B. Mitchell and his wife, which

the trustee in each case are as follows: Sais als, that the trustee in each case are as follows:

The verified enemer of the respondent states, inter plant "This respondent elleges on information and belief that

none of his producessors in office ever caployed the firm of Smietania, Conlon and Magua to file the Toreclasure saits as the in said interventag petition and denies that he, as received of the Union State Deals of South Chicago, ever ougleyed said firm of Smictania, Conlon and Manus to file the said foreelesure suits and avers that said Julius F. Maistanks caused proceedings to be incitivated weiten fachacter blaz has guich on to imphogrer and anichoba ivodity sanibectors his lo amilif out to solion was that solned you athubs and any demand for the filing of said proceedings was riven or was made upon his predecessors in office and calls for strict proof of any notice or of any demand. * * * Avers timt be at no time authorized Julius F. Smistanka, as trustee, to institute the cforesaid forselosure canibeeoog his bedutitus in beitge T. Tailte this that the bedung the conference of by virtue of the cowers granted to said Julius P. Imietanka in the respective Trust Deeds; that under the terms of said frust Deeds the charges of the attorneys for said trustee became a lien on the real estate foreclosed and that said firm of best fanks, Conlon and Knaus, wool of hatagildo one shook that evitosgeer out to amost out robus to the color and the delivery of by save the color of for their fees, as attorneys for said trustee."

The suditor of public accounts of the State of Illinois. Frank by the suditor of public accounts of the State of Illinois. Frank had in his possession the following: A total of 37000 of mortgage notes signed by John Sinila and his wife, which notes were part of the conveyin the conveyin that the conveyin the conveyin the conveyin that the conveyin the conveyin the conveyin the conveyin the conveyin the conveyin that the conveyin the conveyin

notes were part of an issue of \$6,500 secured by trust deed to Julius F. Smietanka, as trustee, conveying certain real property. A total of \$1,400 of mortgage notes signed by George Starcevich, which notes were part of an issue of \$4,500 secured by trust deed to Julius F. Smietanka, as trustee, conveying certain real property. Mr. Smietanka was an organizer of the bank and at the time it went into receivership he was an officer and director of it. Defaults were made in the payment of some of the notes of the above issues and Smietanka, as trustee, caused the three foreclosure suits in question to be commenced. Ryan, Condon & Livingston, who were also attorneys for the receiver of the bank, filed the said suits for the trustee. During the pendency of the foreclosure suits Ryan, Condon & Livingston withdrew as attorneys for the trustee and the firm of Smietanka, Conlon & Knaus (of which firm Smietanka is senior member) were substituted as attorneys for the trustee. Sometime after the suits were filed McKey resigned as receiver of the bank and William L. O'Connell was appointed as successor receiver. Thereafter O'Connell died and Charles H. Albers was appointed receiver of the bank, and is still acting as such. Smietanka, Conlon and Mnaus performed practically all of the work in the foreclosure suits. A decree of foreclosure and sale was entered in each of the cases. Foreclosure sales were held in each case and Smietanka, as trustee, bid for the property in each case and it was struck off to him. No cash was paid at the sales but the indebtednesses / him, as trustee under the terms of the trust deeds, were applied on the bids. The sales were approved and master's certificates of sale were issued to Smietanka, as trustee, and he now holds title to each of the properties for the benefit of the owners of the notes secured by the trust deeds. decree of foreclosure and sale the court found that there was due to the intervenor, as trustee, certain sums for attorneys' fees, court costs, stenographer's fees, master's fees and commissioner's expenses, and that all of the said sums constituted additional indebtedness under the terms and provisions of the trust deed foreclosed. After the

notes were part of an issue of to poored by tract as a relieur To Isjoi A . virecore incr mistres anivernos estaut as aninciona . tales to series and an ideas of second located and an old and an inches were part of an issue of pi. 500 secured by trust deed to Julius P. Smietanka, as trustee, comering cortain real property. Mr. unistanka Cingrovias T offit from the only off to but into off to Touluarto no gaw he was an officer and director of it. Defaults were made in the payent of some of the notes of the shows to sead this tanks, a caused the tures forcelesure suits in succiton to be commenced. Condon & Livingston, who were also attorneys for the receiver of the not relied the said subte for the trustee. During the condensy the foreclosure suits Ryan, Condon & Livingston withmen as attorneys for the trustee and the firm of Grietarice, Conlon & Musus (of which and nol systemits as being if adno even (reduce roines at sancials and trustee. Sometime after the guits wow willed below resimmed as receiver of the bank and William L. O'Council was appointed as successor receiver. Thereafter O'Commell died and Charles M. Albers was appointed receiver of the bank, and is still acting as guela, Caletania, Conlon and Magus A a situe or selection of the work in the foreclosure suite. docree of foreclosure and sale was entered in each of the cases. Foreclosure sales were held in each ease and Omictanica, as trustee, bid for the property in each case and it was struck off to him. To each was paid at the seles but the indebtednesses with, as trustee under the terms of the trust doods, were applied on the bids. The sales were uproved and master a sertificates to select the master to smistering. ed trustee, and he now holds title to each of the properties for the the of the owners of the notes secured by the trust deads. as a foreslosure and sale the court found that there was due to the interrupce, as trucken, sectain mans for attempts? from court costs, stenographer's fees, master's fees and commissioner's expenses, avone conditional I would be accompanied was also as to He Said but ont retta becolered to the trust deed forestered and and the

decrees were entered Smietanka, as trustee, took possession of the properties in question, is still in possession of them, and, through his agents, is collecting the rents and profits.

Mr. Smietanka testified that he had conversations with Mr. Mckey shortly after the suspension of the bank and that "he said that he had a number of the bonds and notes in default and wanted to institute foreclosure proceedings and would like me as Trustee to co-operate in all of these matters and I agreed to do so. I told him that it was to my interest to assist in liquidation of the assets of the bank, because I was a director and an organizer of it, and one of the officers. * * * Mr. Conlon [attorney for petitioner]: Did you have any other conversation with reference as to who was to be the attorney for Mr. Eckey in the foreclosure proceedings? The Witness: Yes. Mr. Conlon: What was that conversation. * * * The Witness (continuing) The substance of it was that I was to go along with the general counsel of the Receiver. * * * Ryan, Condon & Livingston were the general counsel for the Receiver. I did not have any conversation with Mr. McKey with reference to who would advance the court costs and pay the attorneys! fees for these particular foreclosures, except that Ryan, Condon & Livingston were to be paid on a per diem basis out of the assets of the bank. I was never paid by the Receiver of the bank or by anyone else for the services rendered in these foreclosure proceedings. * * * The conversations were then had with the officers, or with the attorneys, Ryan, Condon & Livingston, that I would be indemnified against any costs or damages. * * * That was about the beginning of the foreclosure proceedings. I was given these assurances by Mr. Burke of the firm of Ryan, Condon & Livingston. After the work progressed to a certain point, Mr. Burke came to see me and said that they could not go along with these foreclosures, and that I, as Trustee was in a more favorable position to bring them to a conclusion. After the foreclosures were completed, I as Trustee took possession of these properties, and I am still in possession and through agents, collecting the rents and profits. I then went down to see Mr. Keenan [deputy recriver] and had a talk with

decrees were entered unistants, as trustes, book possession of the properties in question, is citil in possession of them, and, through s, is collicating the rents and profits.

if the table testified that he decoverentions with Mr. Melley shortly after the suspendion of the bank and that the said of bejum has ilusted at cejon bus sence off to reduce a bed of tadt institute Toreclosure proceedings and rould like me as Truster to .oe oh of beergs I has ereffen seedt to fis at efereqo-oo To noit bin if mi taines of fuereshi ym of anw ii tant to one has the resimple on her reforming a see I seemed wined will any other conversation with reference as to who was to be the afterney for Mr. 1 offer to the contract of the formation of the f its, Contains was but they seemen white, is a wifer transport fourth Isanuos Larence of this prels or et ter I tell ter it lo sometadus eff of the Receiver, * * * Hyan, Condon & Livingston were the general counsel for the Receiver. I did not have any conversation with Mr. MeKey with reference to who would savance the court costs and pay the sttorneys! these for the later we have the second and the second Livingston were to be paid on a per diem basis out of the assets of the bank. I was never paid by the Receiver of the bank or by anyone else for the services rendered in these forsologure proceedings. * * * The eventorise wire then had with the officers, or with the attorneys, Ryan, Condon & Livingston, that I would be indemnified against any numerication of to printing of the same year as a respective education proposition I was given these assurances by Mr. Burks of the firm of Agree, Condon & Livingston, After the work progressed to a certain paid to rea blood paid that has no see at east chart, all and alls those Ferezionaras, and that I, as Tracine and IS & zon taveration position is bring them to a conclusion. There in for characters were completed, I as Trustee took possession of these properties, and I am still in the rate of the collecting the ranks and profits. went down to see Mr. Keenan [deputy receiver] and had a talk with him about the payment of these accounts - Faster's fees, costs advanced, and attorney's fees. I had prepared statements of accounts in each case and sent them to the Receiver. Six or seven months after the statements were sent, I had a conversation with Ir. Keenan, and he said he would let me know later. I'mo or three months later, I pressed for a settlement of the account. Ir. Heenan then told me that they were willing to pay the accounts provided that we were able to - -Mr. Moran [attorney for appellant]: Object. That is a discussion in the nature of settlement. The Court: I will reserve raling at this time. He may answer to the reservation. The witness (continuing): Mr. Keenan suggested that he did not think we had obtained a good title, and I as Trustee did not have authority to convey a good title by sale. We discussed the propriety of my action and the result of our conversation was that if we conformed with their ideas regarding title that they would be willing to pay the account. Mr. Moran: I ask that that be stricken. The Court: It may stand, subject to your motion to strike. The Witness: The language of the conversation was this, 'If you will show us that the Title and Trust Company will guarantee the title in you, we will pay this account, or recommend its payment. I then took a typical case that we handled in the office, and applied for guaranty policy and I told Mr. Meenan that the Title and Trust Company, after it had made its examination was ready to guarantee the title providing we brought in a deed of conveyance to the purchaser. It developed in a subsequent conversation that the three cases in this intervening petition were registered in the office of the Registrar of Pitles, and I advised Mr. Keenan that the authorities in that office would not pass on the title unless I as trustee was ready to make conveyance to some prospective purchaser. In subsequent conversations, Mr. Keenan insisted that he would do nothing about the account unless I proceeded to organize the bondholders into a trust along the lines he had in mind. I told him that I was sure that the title I hold was one that I can deliver and will be guaranteed by the Title and Trust Company. No objections have ever been made to the title I acquired

him about the payment of these accounts - : after a fees, core advanced, done in atmosph la states and bregger had I . . 2001 s'yearotta ban ouse and nent them to the Noc iver. I'm or save, months after the statements were sent, i had a conversation with .r. Mosnam, and he said he would let me know later. ... or three would later, I present year the actionent of the account, it. Account then the settlement of - of elde ever we that believe grounds that we were alde mi molecuscio a ci fadi . Josido : inallega voi vontolia i maron . Th the nature of settlement. The Court: I will reserve ruling at this time. He may answer to the reservation, The Witness (continuing): hoon a beniatio bad an half to bib of tail before need and . The eliti boon a yevenee of the authority as I bas ;eliti To five to discussed the property of my solion and the result of our conversation was that I seemformed with their asset regarding is I into what they would be seen the secount. It. Moran I ask that that be stricken. The Court: It may stand, subject to your motion to strike. The Mitness: The language of the conversation was this, if you will show us that the fitle and Trust Company will guarantee the .inemyay aif huemmoor to .tous so aidt yay Iliw ew .woy ni eliji then took a typical ease that we bendled in the office, and applied four marging placed in the first the Title Part the Title and Trust Company, after it had made its examination was ready to guarantee the title providing we brought in a deed of conveyance to the purchaser. this access some that the convergence of the conver raticized of the coline the coline of the Hegisters of Titles, and I savised Er. Neenan that the authorities in that office walls no the pass on the title unless I as Irustes was read to bluow donveyance to some prospective purchaser. In subsequent conversations, us. No eren incisted that he would do notifing about the account out on annil edit gnois trust optical der bood optical edit estat along the tines asw blod I slift shift sure sure I talt wid blof I . had in mad in trust bus elitif edit yd heeinsraug ed iilw bus wevileb mee I fadt eno Company. We objections have ever been made to the title I acquired

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by my bid at the foreclosure sale, except by Mr. Keenan and Mr. Schmidt [Keenan's assistant], and their objection was that I was not willing to call in a lot of contending bondholders and seek to do something which already was accomplished, namely, a good title set in myself as Trustee. I offered to turn over possession of the building involved to them so that they might collect the rents and apply them on account of the money that they had advanced and would advance. And in each of these cases involved in this petition demand was made upon me, or request, by Mr. McKey, to start foreclosure. Mr. Moran: At this time I renew my motion to strike Mr. Smietanka's testimony on the ground that all conversations related by Mr. Smietanka were in the nature of a compromise and were held for the purpose of settling this matter. As a second ground, Mr. Smietanka's testimony should be stricken for the reason that it goes beyond the scope of the petition. The Court: I now rule that that evidence is competent, and it may stand."

Harvey J. Keenan, called as a witness on behalf of the respondent, testified that he was a deputy receiver of the bank, appointed in 1934; that he was familiar with the records of the bank and that they do not indicate that Smietanka, Conlon & Knaus were ever appointed attorneys to act for Mr. O'Connell, receiver; that he (Keenan) never authorized that law firm to perform any services on behalf of the receiver of the bank; that he never employed that firm to represent the receiver in the three cases in question; that he never agreed, on behalf of the receiver of the bank, to pay ir. Smietanka any fees for services performed in the said suits. The witness further testified that the three foreclosure suits were first brought to his attention in December, 1936. The witness was further examined, as follows: "Mr. Conlon: Mr. Keenan, as Deputy Receiver, after the firm of Smietanka, Conlon & Knaus substituted, did you have any conversation with Mr. Smietanka with reference to the fees and matters claimed in this petition? Mr. Moran: I object to that. The Court: Objection overruled. The Witness: Yes, sir. Mr. Conlon:

by my bid at the free-Carmer sale, carryl by the Carmer and the Solution was assistant, and their objection was that I was Mess has a reflorible of minimular to fol a mi Ileo of milliw for to do something which cleredy was second, hamely, samely, a moissoned a vo mand of Sauchlo I , setabli as his and jes elfif add Joelloo trigin went first or mad of bovlovet gaiblihad out to because had yadd ind years and to inverse as med ylags bas siner and would advence. And in each of these eases involved in this tante of golden and a treater or reason as it lolley, to foreslosue. W. Morene in this time I remer as switch to stallo anolisesymme Lie but howers all me youndest a solutelest at related by ir. Undetamine were in the nature of a compromise and were eld for the purpose of settling this metter. as a second ground, if. Smietanke's testimony should be stricken for the reason that it goes beyond the scope of the petition. Inc dourt: I now rule that ".basta yan di hun jima engence al senshive dadi"

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Isn't it a fact that in that conversation you stated to Mr. Smietanka that you had no objection to advancing these sums for the fees and costs, provided the liquidation trusts were set up in a manner that was acceptable to you? Mr. Moran: I object to that. These conversations had between Mr. Smietanka and Mr. Keenan were had for the purpose of compromising this matter. Mr. Keenan has no power himself to pass on whether the Receiver of the Union State Bank of South Chicago will pay the fees requested. The power to pass on whether they shall be paid lies in the Auditor of Public Accounts of the State of Illinois. The Court: I will reserve ruling on that question. He may answer subject to the reservation. The Witness: Yes, sir." The witness further testified: "The Receiver of the Union State Bank of South Chicago is not the holder of the total indebtedness outstanding in the Sinila issue. He owns \$6,100 out of a total issue of \$16,000. In the Mitchell issue, the total indebtedness is \$6,500, and the Receiver of the Union State Bank holds the sum of \$3,000. In the Starcevich issue the total indebtedness is 4,100, and the Receiver of the Union State Bank holds \$1,400."

It was stipulated between the parties that "Charles H. Albers, as Receiver of the Union State Bank of South Chicago, or his predecessor in office made certain expenditures or advances for court costs, stenographer fees, subpoenas, and photostatic copies, in the cases of Smietanka v. Nitchell, Smietanka v. Starcevich, and Smietanka v. Sinila."

No evidence was introduced to show that Mr. Burke, connected with the firm of Ryan, Condon & Livingston, had any authority to bind the receiver of the bank to indemnify the petitioner against any costs or damages he might sustain in the foreclosure proceedings, The rights and liabilities of a trustee under a trust deed are determined by the instrument creating the trust. The trust deeds foreclosed were not introduced. In the instant case there can be no inference indulged in that there was any provision in the trust deeds that would charge a holder of one of the notes secured by the trust deed with

and the first that in teat conversition you at the contract that ing seel the act case essai unleasure of notice; do on had new jadi design the light that were were the line we were the was acceptable to your intent I object to that. Ileas canyersettons had between it. inclotenion and ir. Harman word land for the purpose of compromising this matter, it. Assum has no power winself dinor to the sile of as a maint one to novie and and redistin no assa of Chicago will pay the fees requested. The power to have on whether ed at. only to extraces, offder to refigure and no early find and flade year of Illinois. The Court: I will reserve ruling on Chat suestion. He may answer subject to the recervation. The Lithes: Nos. sir." The witness further testified: "The Receiver of the Union Justo Cank -Juc Lander industrial the tolder of the toldest indebtedness ofto small feed a to two Office arms of . erset affine ent in animate \$16,000. In the Mitchell issue, the total inhebtedness is abjuly, and the Receiver of the Union State Dank holds the acts of \$7,000. In the Starcevich temes the total inlebicedness is philar, and the Receiver of the Union State Renk holds (1. 400,"

as Receiver of the Union State mank of couth Chicago, or his predecessor in office make cortein expenditures or advances for court costs, stenographer face, supposed, and photostatic copies, in the costs.

Mo evidence was introduced to show that ir, Burks, connected with the firm of Bran, Condon & Livingston, had any authority to bind the firm of Bran, Condon & Livingston, had any authority to bind the conton of damages he might sustain in the foreclosure proceedings.

If this and liabilities of a trustee under a trust deed are determined to the conton of the trust deeds that would in the trust deeds that would the of one of the notes secured by the trust deed with

all the costs and expenses of a foreclosure suit.

Appellant strenuously contends that the trustee has a lien on each of the foreclosed properties for the costs and expenses of the suits and that he must look to said property for the payment of his liens; that the order entered in the instant case is highly inequitable and without justification under the law. We agree with this contention. The trustee is an able lawyer and has had years of experience in the practice of his profession. He was an organizer. officer and director of the bank and was familiar with the rule that he who deals with a receiver of a bank does so with knowledge of the fact that the receiver is limited in the scope of his authority. Under the facts it would be idle to argue that the trustee made a binding contract with the receiver to be paid for the costs and expenses sustained in the foreclosure proceedings. Mr. Smietanka testified that he never talked with the receiver in reference to who would pay the court costs and the attorneys' fees for the foreclosure proceedings, Certainly no binding contract was shown by the statement of the trustee that Mr. Burke, connected with the firm of Ryan, Condon & Livingston, told him that he, the trustee, would be indemnified against any costs or damages in the proceedings. Mr. Smietanka testified that he told the receiver "that it was to my interest to assist in liquidation of the assets of the bank, because I was a director and an organizer of it, and one of the officers." The costs, attorneys' fees and expenses allowed a trustee in a foreclosure proceeding decree are paid to the trustee from the income or proceeds of the sale of the properties involved in the foreclosure proceedings if sufficient money is available to pay the same. The trustee in the instant case followed the usual procedure and the decrees in the foreclosure proceedings fully protected his rights. As trustee he is now in possession of the properties and collecting the rents and profits. There was no showing made that the properties will not pay the trustee what is due him under the decrees. The bank receiver is interested only in a part of the notes foreclosed in each proceeding. Yet, under the

all the costs and empenses of a foreclosure outl.

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well a and deferred out first abreshoe glauosmerta incliegga To seaments and office off to a self-record beaclestof end fo dees no the suits and that he suct Look to said property for the payment vificial of some smederni end at become cetto end tand canoil aid to inequitable and without fastilestion under the law. '. arree with this contention. The trustee is an able larver and has had yours of experience in the practice of his profession. He was an arguniage, ted of the twin the religious flow bere three out to record be a selfto he who deals with a ressiver of a bank does so with knowledge of the raint, the receiver to the the spope of his relieved to the raint to the the facts to would be ifle to argue that the trustee made a binding contract with the receiver to be said for the earts and expenses sustaile foreclosure proceedings. In. Sailclanks testified that edt yat himer ouw of concreter at wwiseer edf njiw beilet geven ed court costs and the attermeys! Yess for the foreclosure procedings. Certainly no bimiding contract was a cown by the statement of the trustes that He, Surjey, unconsisted with the Plant of Spine, seeded A Delingtime, told him that he, the trustee, would be indemnified against any costs or demands in the proceedings. It, swietenke testified that he teld To moliphicall mi dailes of tearethi ym of apy il tadi" revieser edi the essets of the bank, because I was a director and an organizer of it, and one of the officers." The costs, attorneys fees and ers served a trustee it a rerectory proceeding bewells seemen edd to size trustee. From the income or preceded to the yenca insisilize it appliescent sursolvenol sais at bevioual selfregore dewelfol east that and eithe trustee in the instant asser followed symbosoure crucolector ont the decrees of the sourceclosure procedure To moissessed his progress as trusted he is now in possession of on see cook and cook on rence and provide and cook of the cook and the rest of the conjugate of the first and the conjugate of the conjugate of out in a der the decrees. The bank receiver is interested only in To the notes foreclosed in each proceeding. Mot, under the

order entered in this case, the bank receiver is ordered to pay the total attorneys' fees and expenses of the trustee out of the assets of the bank that belong to the depositors and creditors of the bank, the receiver to be subrogated to the rights and privileges of the trustee under the foreclosure decrees. The order in this case allows the trustee \$1,200 for attorneys' fees in the Binila foreclosure, \$450 for attorneys' fees in the Bitchell foreclosure, and \$300 for attorneys' fees in the Btarcevich foreclosure. No good reason has been shown why the trustee should not abide by the usual procedure. As we read the record the petition amounted to an effort by the trustee to accelerate the payment of his attorneys' fees and the expenses of the trustee, the receiver to advance to the trustee the amounts in question and take chances of possible reimbursement in the future. The receiver was fully justified in refusing to pay the claim of the petitioner.

The order of the Circuit court of Cook county entered March 28, 1939, is reversed.

ORDER ENTERED MARCH 28, 1939, REVERSED.

Friend, P. J., and Sullivan, J., concur.

order entered in this case, the best receiver is ordered to pay the total attorneys' fees and expenses of the trustee out of the assets of the bank that belong to the depositors and creditors of the bank, the receiver to be subrogated to the highes and privileges of the trustee under the foreclosure decrees. The order in this case allows the trustee (1,200 for attorneys' fees in the similar and \$300 for attorneys' fees in the tarreavies foraclosure. No good reason has been shown why the trustee should not abide by the effort by the trustee to accelerate the position amounted to an effort by the trustee to accelerate the position amounted to an trustee the expenses of the trustee, the receiver to maveure to trustee the amounts in question and tone chances of possible reducing to pay the claim of the positioner was fully justified in reducing to pay the claim of the positioner.

The order of the Circula court of Cook Sounty entered sureh 28, 1939, is reversed.

CROSER WILLERED MARCH 28, 1939, REVERSED.

Friend, P. J., and Sullivan, J., concur.

40992

JOSEPH E. MERRION, (Plaintiff and Counter-Defendant) Appellee

V.

JOSEPH ALTMAN et al., (Defendants and Counterclaimants) Appellants. APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Joseph E. Merrion, appellee, obtained a judgment by confession against Joseph Altman and Adella C. Altman, his wife, appellants, for \$607.50 upon a judgment note for \$500 signed by appellants and payable to appellee. The amount of the judgment included interest and attorney's fees. Appellants filed a verified petition praying that the judgment be vacated and set aside, that they be given leave to offer their defense to the claim, and that they be allowed to file a counterclaim. An order was entered that the judgment be opened, that defendant be allowed to make defense to the claim, that the judgment stand as security, and that defendant be given leave to file a counterclaim, plaintiff to answer the same. After a trial by the court final judgment was entered confirming the judgment entered by confession. Defendants and counterclaimants have appealed.

Appellants: verified amended defense sets up:

- "1. That they are not indebted to plaintiff upon the note upon which judgment was entered herein.
- "2. That said judgment is upon a note executed by them for \$500 and delivered to plaintiff under the circumstances hereinafter set forth.
- "3. That during the months of April, May and June, 1937, plaintiff was a real estate broker and engaged in business as such in the City of Chicago, Illinois, and that as such real estate broker he communicated with defendants and informed them that if



iR. JUSTICE SCANLAR DELLVERED THE CRISTON OF THE COURT.

Joseph E. Merries, appellee, obtained a judgment by senfession against Joseph Aliman and Adella C. Aliman, his wife,
appellants, for \$507.50 mean a judgment note for \$500 alimed by
appellants and payable to appellee. The amount of the judgment
included interest and attorney's fees. Appellants file; a verified
petition praying that the judgment be vecated and set aside, that
they be given leave to effer their defense to the claim, and that
they be allowed to file a counterclaim. An order was entered that
the judgment be opened, that defendent be allowed to make defense
to the claim, that the judgment stand as security, and that defendant be given leave to file a counterclaim, plaintiff to answer the
same. After a trial by the court finel judgment was entered confirming the judgment entered by confession. Defendents and
counterclaiments have appealed.

Appellants' verified amended defense sets up:

- "I. That they are not indebted to plaintiff upon the note upon which judgment was entered herein.
- "2. That said judgment is upon a note executed by them for \$500 and delivered to plaintiff under the circumstances hereinafter at Carla.
- "3. That during the months of April, May and June, 1917, plaintiff was a real estate broker and engaged in business as such in the City of Chicago, Illinois, and that as such real estate wolf or communicated with defendants and informed them that if

they were interested in purchasing the real estate located at 1415-1419 East 67th Street, Chicago, Illinois, that he could obtain the same from the owner thereof at a very low price, and that if they would authorize him to do so, he would obtain the very best price possible at which they could purchase said property from the said owner; that defendants, relying upon plaintiff to obtain for them the said real estate at the very lowest price, authorized and directed plaintiff to negotiate for the purchase of said property by them, at the lowest net price to defendants; that it then and there became the duty of plaintiff to get the said real estate for defendants at the lowest price at which it could be obtained.

- "4. That after defendants authorized and directed plaintiff to negotiate for the purchase of said real estate, as aforesaid, plaintiff informed defendants that the very best price for which the said real estate could be obtained was \$11,500, and defendants relying upon plaintiff and the representations made by him, and believing the said representations to be true, then and there agreed to purchase the said real estate and to pay \$11,500 therefor.
- "5. That in order to pay said purchase price, defendants procured a mortgage loan in the sum of \$6,000, the proceeds of which were applied to the payment of said purchase price, and defendants paid the further sum of \$5,000 in cash and delivered to plaintiff the note sued upon herein in payment of the balance of \$500.
- "6. That the said representations made by plaintiff were false and untrue, and plaintiff fraudulently and with intent to make a secret profit at the expense of defendants, informed defendants that the best price for which said real estate could be obtained was \$11,500, whereas plaintiff then and there knew that the said real estate could be obtained for much less than the sum of \$11,500, and at the cost as hereinafter set forth.
- "7. That by reason of the false representations and the fraudulent conduct of plaintiff in that behalf, defendants did not know that the said real estate could be obtained for less than

they were interested in purchasing the real estate located at 1415-1419 East 67th Street, Chicago, Illimois, that he could obtain the same from the owner thereof at a very low price, and that if they would anthorize him to do so, he would obtain the very best price possible at which they could purchase said property from the said owner; that defendants, relying upon plaintiff to obtain for them the said real estate at the very lowest price, authorized and directed plaintiff to megotiate for the purchase of said property by them, at the lowest net price to defendants; the tit them and there became the duty of plaintiff to get the said real estate for defendants.

"4. That after defendents sutkerised and directed plaintiff to negotiate for the purchase of said real estate, as aforesaid, plaintiff informed defendants that the very best price for which the said real estate could be obtained was \$11,500, and defendants relying upon plaintiff and the representations made by kin, and believing the said representations to be true, then and there agreed to purchase the said real estate and to pay \$11,500 therefor.

"5. That in order to pay said purchase price, defendants procured a mortgage losn in the sum of \$6,000, the proceeds of which were applied to the payment of said purchase price, and defendants paid the further sum of \$5,000 in each and delivered to plaintiff the note such upon herein in payment of the balance of \$500.

"6, That the seid representations mede by plaintiff were false and untrue, and plaintiff fraudulently and with intent to make a secret profit at the expense of defendants, informed defendants that the best price for which said real ostate could be obtained was fall, 500, whereas plaintiff them and there knew that the said real act the cost as hereinafter set forth.

17. That by reason of the false representations and the fraudulent conduct of plaintiff in that behalf, defendants did not know that the said real estate could be obtained for less than

\$11,500 and that plaintiff was actually paying less than \$11,500 to obtain the said real estate for defendants; that several months after the said deal was consummated and defendants purchased the said property, they discovered the facts relative to the cost of obtaining said real estate, and informed plaintiff that they would not pay the note for \$500 held by him, being the note sued upon herein, and demanded that he account to them for the amount which he obtained from defendants by reason of the misrepresentations and fraud practiced upon them as hereinbefore set forth.

- "8. That plaintiff had in fact obtained the said real estate for \$9,000 and plaintiff received for himself, the sum of \$2,000 in addition to the note sued upon herein in the sum of \$500, being the difference between the cost price of \$11,500 represented to and paid by defendants, and the said sum of \$9,000 paid for said real estate.
- of \$320.49 for taxes paid and allowed, title charges, and other expenses paid by him in obtaining the said real estate for defendants and consummating the purchase thereof by defendants; that after crediting the plaintiff with the said sum of \$820.49, plaintiff is indebted to defendants in the balance of \$1,679.51 for which defendants demand a counter-claim against plaintiff; that \$500 of the said sum of \$1,679.51 is represented by the note sued upon herein in the sum of \$500; that by reason of the fraudulent conduct of plaintiff in connection with the said deal, plaintiff has forfeited and is not entitled to any credits as real estate commissions or otherwise, in connection with the purchase of said real estate.
- "10. That the said note sued upon herein was fraudulently obtained by plaintiff from defendants and is void and without consideration, and defendants are not indebted to plaintiff upon said other note or in any/sum whatsoever."

Appellants' amended counterclaim sets up that "defendants claim that plaintiff is indebted to them in the sum of \$1,179.51

fil, 700 and that (Laintiff was actually paying less than all, 500 to obtain the said real estate for descriants; that several months after the said doal was conquenated and defendants purchased the said property, they discovered the facts relative to the cost of obtaining said real estate, and informed plaintiff that they would not pay the note for \$500 held by him, being the note such upon herein, and demanded that he account to them for the amount which he obtained from defendants by reason of the misrepresentations and fraud practiced upon them as hereinbefore set forth.

"3. That plaintiff hed in feet obtained the seid real estate for #9,000 and plaintiff received for nimealf, the sum of #2,000 in addition to the note sued upon herein in the sum of : 500, being the difference between the cost price of 411,500 represented to and paid by defendants, and the said sum of #9,000 paid for said real estate.

"9. That plaintiff is ontitled to eredite in the total sum of \$320.49 for taxes raid and allowed, title charges, and other expenses paid by him in obtaining the said real estate for defendants and consummating the purchase thereof by defendants; that after crediting the plaintiff with the said sum of \$320.49, plaintiff is indebted to defendants in the balance of \$1,679.51 for which defendants demand a counter-claim against plaintiff; that \$500 of the said sum of \$1,679.51 is represented by the note sued upon herein in the sum of \$500; that by reason of the fraudulent conduct of plaintiff and connection with the said deal, plaintiff has forfeited and is not entitled to any credits as real estate commissions or otherwise, in connection with the purchase of said real estate.

"10. That the said note sued upon herein was fraudulently obtained by plaintiff from defendants and is void and without consideration, and defendants are not indebted to plaintiff upon said note or in any/sum whatsoever."

Appellants amended counterclaim sets up that "defendants claim that plaintiff is indebted to them in the sum of \$1,179.51

for monies fraudulently obtained by plaintiff from defendants under the following circumstances: Then follow a number of paragraphs which are the same as paragraphs three to nine, inclusive, of appellants' ame ded defense. The "defendants pray judgment against plaintiff for 1.179.71 and costs." Appellee's verified reply to the counterclaim states, inter alia, that "plaintiff states the fact to be at no time has plaintiff ever as erted to defendants or to any of defendants' agents that plaintiff or plaintiff's agents might, could or would obtain the property in question or any other property placed in plaintiff's hands for sale at the 'best possible price' or 'the lowest possible price' or used any equivalent expression with reference to so benefiting a buyer as against the interest of plaintiff's principal, the seller; * * * that defendants signed and delivered the note sued upon and upon which judgment was heretofore rendered as part of the purchase price of a certain real estate sale and transfer, in which plaintiff represented the seller and that said note was retained by plaintiff as part of plaintiff's real estate brokerage fee and commission to which he was and is entitled."

Appellants contend that appellee was their agent in the purchase of the real estate and that he was guilty of a breach of his duty to them; that the judgment is contrary to the evidence, and that the court erred in confirming the judgment by confession and in failing to give judgment for appellants upon their counterclaim.

Augusta Walsh, who owned the real estate in question, had incumbered it with a trust deed to secure her note for \$10,000. The holder of the note had a judgment by confession entered thereon and also instituted foreclosure proceedings. Mrs. Walsh wrote the following letter to her attorney, De Haan:

"Chicago, Illinois February 13, 1937

"Messrs. Frisch & De Haan 134 N. LaSalle Street Chicago, Illinois

"Attention Mr. De Haan

"In re: Property located at 1415-17-19
E. 67th Street

Tobac asmile ten most Thisticle wi benies do visualabusti acinom vol the following to medium, a wollow medit " is easing amount of the olion and which are the same as paragraphs show to chuc. includive, of racing a december the religious offer all content to the server is a racing of the content of th plaintiff for 1,179.51 and cours. " : rellen's verified reply to the counterclain states, inter alia, that "plained?' states the Pack The of to conclusion or being an tave blishing sen omit on to od of . In im suntre of Til mish we This dishe fant aimens 'standard to tiregory and to make the property of the control of opened in plaintiff's heads for seas to the 'sast nousil's spice' or mile nolecorese implevious yes here to 'soire aldisses tesmof ent' -mixic To Jast Jal only familian as round a mailleaned on of somereler ine bentic educated at Jani * * * relies odd . Lacisaira a Tild erofoservil and there it holds now has more been ein ent berevileb sing efaice has ministed a to coing condense and to frag as berebner and transfer, in thick plantfill represented the aller and that said etaire lees a "Thinhals to tree as 111 sigly ve besister asy eten brokerage fee and countssion to which he was and is entitled."

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Appellants contend that appelles was their agent in the purchase of the real estate and these he was guilty of a breach of his duty to them; that the judgment is contrary to the evidence, and that the court erred in confirming the judgment by confession and in failing to give judgment for appellants upon their counterclaim.

injusts "malsh, who owned the real estate in question, had incumbered it with a trust deed to secure her note for \$19,000. The holder of the note had a judgment by confession entered thereon and also instituted foreclosure proceedings, Irs. Walsh wrote the following letter to her attorney, De Hean:

achioaro, lilluitud aurtar, 13, 177

> "Assers. Frieds & D. 130 . La ella Herric Chlorop, Mildreis

"In ret Property Located at 1415-17-15

[&]quot;Attention Mr. De Burn

"My dear Mr. De Haan:

"Supplementing our conversation, you may consider this your authority to contact the Receiver of the Moodlawn Trust & Savings Bank with the understanding that I will deliver title to him upon a cancellation of the first mortgage indebtedness now against the property. You are also authorized to contact Mr. J. M. Merrion of J. M. Merrion & Company with the definite understanding that any services rendered by him are to be without costs to myself, for the purpose of securing a cancellation of the first mortgage indebtedness in consideration of a conveyance of the property."

Although appellee testified, over the objection of appellants, that before the above letter was written, he had a talk with a son of Mrs. Malsh, at which time the son stated that he wanted to get appellee authority from his mother "to work on the deal and whatever money was made, we would get for working out this deal, and he got me a letter of authority to work on the deal in February, 1937." he admitted that the letter of February 13 was the sole source of authority to act for Mrs. Walsh. Appellee was a real estate broker and advertised properties for sale. Appellant Joseph Aliman, at the time in question, was a public high school teacher for the city of Chicago. He had some money to invest and seeing certain advertisements of appellee he called at the latter's office and talked with one Corbett, employed as a salesman by appellee, in regard to purchasing real estate. Altman testified that he inquired about apartment buildings and several were shown him by Corbett, but that he did not care to buy any of them: that Corbett then told Altman that he had some stores that could be bought at a bargain price, and described the premises, which proved to be the Walsh property; that Corbett stated that the property would be available in about ten days, that he knew the owner and he felt he could get a good buy on the property; that Altman told Corbett to go out and do the best he could, that he wanted to get a good deal on the property, the best possible: that Corbett then said he would so out and get the best deal for Altman that he could; that he knew the property was all right; "that he knew these people and that we could make a good deal and that he could get a good deal for me and get

"I'y deer Mr. Do Huan:

posterion of J. S. samion & Company with the defi s'andim: that any sarvises recense by him are to be purpo or onveyance of the property."

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Although appelled testifiel, over the objection of appellants, to not a with a fact a fact of the transfer was a till evolut and is alsi, at which time the non stated that he wented to got provide anthority from his motion of work on the deal and from ser of bas, ise chil to writing of let bow ev . char caw yemon on a lawless of sections for he were on the sent in Pelenson, 2011," To estude clos seld same filtreard of to restable add tent heatings and mandage to not you have many appealing one a real versus bride and savertised properties for sale. Appellant dosept Liming at the time in question, v.s a suchle high school testion for the city of Chicago. He had some money so invest and seeing cortain has softle attended out to believe of seffege to atnomesiatives talked with one Corbett, ongloyed as a selecmen by appailed, in regard to purchasing real estate. Altman testified that he would the already of all mean time latered has sprintled toward and duods that he did not eare to buy say of them; that Corbett then told Altran that he had some stores that could be bought at a bargain price, and described the premises, which proved to be trained by eldaliava ed bloom trager that that before your that the tog bluos oil flot on bas remo out wend oil tolt, sysb not took aft a pool boy on the preparety that of the total the po mat and do the best he could, that he wanted to get a good deal on the property, the best possible; that Corbett them said he would go out and went on one priese of feet mention and fools over set day from bluce ow that the elece seems were that "that Ile and the court was

go so the car to the could go a good deal for a good deel a go

the best deal possible;" that I man asked Corbett how much the property would cost and Corbett stated that there was a mortgage on it for \$10,000, "that it would take \$11,000 or so in order to put the deal across," that altman would have to make a down payment of \$5,000, and corpett would have "no trouble about arranging for the balance of approximately \$6,000;" that Altman told Corbett that the figure sounded satisfactory to him and for Corbett to go ahead. Altman further testified that he had several conversations with Corbett concerning the deal; that in the first conversation, in april or May, 1937, Corbett stated that he could get the property for about \$11,000, and that he would try to get it for that amount; that when Altman called again several days later Corbett stated to him that he could not get the property for \$11,000 and that he would have to have \$11.500; that several other people were trying to buy the property at all,000; that he (Corbett) was dealing with a lady by the name of Mrs. Walsh, who was selling the property. Altman further testified that he did not know the property was incumbered and that a deal was necessary in order to clear the title; that Corbett "did not mention at any time, anything about clearing the title or what it would cost." Altman finally agreed to pay \$11,500 for the property and he and his wife signed a contract. Altman received a copy of the contract but turned it over to appellee. It does not appear to have been introduced in evidence. Appellants paid \$5,000 in cash to appellee and gave him the judgment note in question, for \$500, which was made payable to the order of appellee. In addition, appellee appears to have obtained a loan of \$6,000 for appellants, which was secured by their trust deed on the property in question. Appellee obtained the proceeds of this loan. Altman testified that he supposed, from his dealings with Corbett, that Mrs. Walsh was getting the \$11,500 for her property. Mrs. Walsh received nothing in the transaction. She appears to have quitclaimed the property, but to whom is not clear from the record. The Walsh mortgage was at the time the property of the Woodlawn Trust & Savings Bank, which was then in receivership.

the best deal pensible;" that altern acked Jorbest how much the arandrama a new evenis d'ans ledede disodres sue dees pisses vivesors of relay the tar the the world take of the in the order to put the doel across." thet ditmen could have to make a down acrossit only wo's medicant and confidence on some along the confidence of \$5.000. balance of approximately 46,000;" Sinct Literate told Corbett tint tint figure sounded at tisfactory to him end for Corpett to go shead. Mitte ancident remains for an and an interest remarks iriging the deal that in the first source tion, in the first convers tion, thod wol yell, dorbett state that he could be the property dort to medw fadd throme fadd not to beg of yet bloom ad fadd bas 200. [13 ad fand mid of helada fiedrol relal ayab larevec miega bellae mumili eveni si eveni bluom ed fant has COU. III to'h vetegory ent seg fan bluoe cll, 500; that several other people were trying to buy the property at 411,000; that he (Corbett) was dealing with a lady by the same of boilises the frequency of the property. saw Loob a fault fing beredurent saw ytregore ent would fon hib of fault necessary in order to clear the title; that Corbett "All not mention tion blow it take to elite and the although the depth or the terms to Altmon finally agreed to pay ill, for the proporty and he and his wife signed a contract. Altman received a copy of the contract but turned it over to appelled. It does not appear to have been introdues of its original to the said \$5.000 in sain to appoint on the sain to the sain t gave him the judgment note in question, for \$500, which was made psychle to the order of appelles. In addition, appelles appears to have obtained a loan of \$6,000 for appellants, which was secured by end bemieted eelleggh .neitzeup al ytregorg ent no heeb teurt rient proceeds of this loem. Altmen testified that he supposed, from his dealings with Corbett, that Mrs. Walsh was getting the \$11,500 for her property. But, think seeding action in the bearanties. appears to have quiteleimed the property, but to whom is not clear term the events. The clab mortgage was at the time the property of the wortless true a darker danks shick now then in reselvourily.

On June 6, 1937, appellee offered to pay the receiver of the Bank \$9,000 in full settlement of the Balsh mortgage note. The receiver accepted the offer on June 21, 1937, and on June 24, 1937, a court order was entered approving the settlement mans by the receiver.

The Altman deal was consummated in July, 1937, in the escrow department of the Chicago Title and Trust Company. Save that she wrote the letter of Pebruary 13, Mrs. Walsh, "due to her advanced age and the precarious condition of her health," took no part personally in the transaction in question. She did not receive any money from the proceeds of the sale, nor did she pay any money in the transaction. Attorney De Baan testified that it was his understanding that appellee "had someone who was interested in the purchase of this property."

Appellee states his theory as follows: "Plaintiff's theory is that he was the broker for the owner of the property in question; that he had her authority to sell said realty to defendants, but that if he did not have such authority it would not constitute him agent for defendants; that neither plaintiff nor his agent told defendants that \$11,500 was the best price for which the owner would sell or that defendants could procure the property at a bargain price; but that even if such statements had been made they were not actionable and defendants had no right to rely upon them; and that any profit realized by plaintiff in the transaction came from the owner and is of no legal concern to defendants." Appellee sought to prove by the testimony of Corbett that the latter did not make any statements to Altman that would cause Altman to believe that appellee was acting for the Altmans in the transaction; but when the entire testimony of Corbett is considered in the light of the testimony of Altman and certain undisputed mountain peaks in the case, it is plain that the testimony of Corbett did not successfully rebut the testimony of Altman in reference to the transaction. Corbett conceded that he pretended to be carrying on negotiations between the Altmans and the owners of the property in reference to the price; that he told Althan to make a written offer and he "would submit it to the owners;" that he never submitted any of

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On June 6, 1937, appelles offered to pay the receiver of the Bank \$9,000 in full settlement of the Lain scriptse note. In receiver accepted the offer on June 21, 1937, and on June 24, 1937, a sourt order was entered approving the settlement make by the receiver. The Altman deal was consummated in July, 1937, in the escrew department of the Chicago Title and Frust Company. Save that she wrote the letter of Pebruary 13, Mrs. telsh, "due to her edvamend age and the precarious condition of her health," took to part personally in the transcation in or did she pay any money in the transcation. The proceeds of the sale, fied that it was his understanding that appears on the processed that it was his understanding that appears who was interested in the purchase of this property."

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It is sufficient to say, in regard to the law of this case, that when we find, as we do, that appellee was the agent of the altmans in the purchase of the real estate and that he was guilty of a breach of his duty to them, the law is settled. In Salsbury v. Nare, 183 Ill. 505, the plaintiff furnished the defendant with \$12,480 to be applied to the purchase of certain lands from the owners thereof. The defendant applied only \$6,640 toward the purchases and appropriated the difference to himself. The plaintiff contended that the defendant undertook to buy the land for him as his agent and that the defendant deceived him by making his believe that he paid \$12,480, whereas he paid only \$6,640 therefor. The defendant contended that he in no way acted as agent for the plaintiff. The Supreme court said that the determination of the case depended upon the relation which existed between the plaintiff and the defendant, and further said (pp. 510-512):

"It cannot be said that, in making these purchases, ware acted as agent for Ingraham and Thompson, the owners of the property. The theory, that he was acting as agent for the vendors, is negatived by his contention, that he was himself the owner of the property, and was selling it as his own property to the appellant. If he owned the property himself, or had been given options for the purchase of it

the offers made by iltman, to are, halsh, and that he never saw ire. Malsh. Corbett concealed from altman the fact that the holder of the Walsh mortgage would release are. Talsh from her indebtedness upon the note upon receiving anyou. It is clear that the altmans, in paying the soney and notes, thought that they were buying the property from are. Which and that she we receiving the purchase price. It will be noted that appellee, in his answer to the counterprice. It will be noted that appellee, in his answer to the counterplain, states: "Said note was retained by plaintiff as part of plaintiff's real estate proherage fee and commission to which he was and is entitled." Under the facts of this case appellee could not charge from the could not charge from the this case appellee could not charge from agent in the transaction.

It is sufficient to say, la regard to the law of this ease, that when we find, as we do, that appelles we that agent of the ilthouse in the purchase of the real estate and that he was guilty of a breach of his duty to them, the law is settled. In Salsbury v. Mars. 183 Ill. 705, the plaintiff furnished the defendant with \$12,480 to be applied to the purchase of certain lands from the owners thereof. The defendant applied only \$6,640 toward the purchases and appropriated the difference to himself. The plaintiff centended that the defendant undertook to buy the land for him as his egent and that the defendant deceived him by the land for him as his egent and that the defendant deceived him by the case depended upon the relation which existed between the plain-

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by the owners, he cortainly was not acting as the agent of such owners in making the sales.

"He never told Salsbury, the appellant, nor did the appellant ever know until shortly before the present bill was filed, that the appellee, Ware, claimed to own the property, or to be selling it as his own property, or that he had, or claimed to have, any interest of any kind in it.

"The evidence shows, that Salsbury dealt with Ware as his his agent, or in such a way that a trust relationship existed between them. Ware had no right to take advantage of that relationship to make a profit for himself, which properly belonged to Salsbury. The position, which he occupied towards Salsbury, was one of trust and confidence, and, inasmuch as trust and confidence were placed in him by Salsbury, he could not take advantage thereof to the injury of Salsbury.

"The law upon this subject is well settled. In equity, an agent is disabled from dealing in the matter of his agency on his own account. The agency being established, the agent will be compelled to transfer the benefit of his contract to his principal. even though he may swear that he purchased on his own account. makes no difference that such agent is a mere volunteer; if he professes to act not for himself but for another, he has trust and confidence/in him. The rule applies as well to an agent, who becomes such by volunteering, as to one who is made such by appointment. If confidence is reposed, it must be faithfully acted upon and preserved from any intermixture of imposition. The party relied upon must see, that he meets fairly and squarely the responsibility of his position, and does not take any advantage, either for his own gain, or to the injury of the person whom he represents. If a party employs an agent to make a purchase of land, he is entitled to all the skill, ability and industry of such agent to make the purchase on the best terms that can be had, and is entitled to the property at the price the agent pays. The agent cannot avail himself of any advantage his position

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may give him to speculate to the injury of his principal; all the profits and advantages gained in the transaction belong to the principal. (Casey v. Casey. 14 III. 112; Dennis v. McCasg., 32 id. 429; Cottom v. Molliday, 59 id. 176; Conant v. Riseborough, 139 id. 383; Melberg v. Michol, 149 id. 249.)" (Italics ours.) The court held that the defendant was required to account to the plaintiff for the difference, amounting to \$5,840, retained by the defendant. See, also, the late case of Lerk v. McCabe, 349 III. 348, where the court said (pp. 360, 361):

"The relation of principal and agent is one of trust and confidence, and where such confidence is reposed and such relation exists it must be faithfully acted upon and preserved from any intermixture of imposition. The rule is the same no matter how large or how small the commission paid may be or whether the agent is a mere volunteer at a nominal consideration. (Perry v. Engel, 296 Ill. 549.) an agent acting for the purchaser of land, whether by appointment or as a volunteer, must see that he meets fairly and squarely the responsibility of his position and does not take any advantage, either for his own gain or to the injury of the person whom he represents. (Salsbury v. Warg. 183 Ill. 505.) The rule is well established in equity that the relation existing between principal and agent for the purchase or sale of property is a fiduciary one, and the agent in the exercise of good faith is bound to keep his principal informed on all matters that may come to his knowledge pertaining to the subject matter of the agency. (Reiger v. Brandt, 329 III. 21.) An agent must not put himself, during the continuance of his agency, in a position adverse to that of his principal. To the latter belongs the exercise of all the skill, ability and industry of the agent. If a party employs an agent to make a purchase of land he is entitled to all the skill, ability and industry of such agent to make the purchase on the best terms that can be had. (Cottom v. Holliday, 59 Ill. 176.) An agent cannot deal for his own advantage with the things purchased for his principal, or become a seller or buyer of them, because of his confidential relation and his

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-mos the fourt lo one of those the factories to neithfor enti fidence, and where such com'idence is repused and such relation exists oralization of temperature and preserve and preserve any interest the second Mane were to the relief to the sense on antitor inch arge or nor small resimpley state a si freque sail resident to ed year blog noiselance est st a nominal consideration. (Perry v. Incel, 290 111. 549.) ... agent acting for the purchaser of Land, whether by appointment or as a volumto yillidianouser sait ylerance bus ylrist account that the tage, may ming now aid tol relific .egs.neves you exist for econ bus notifice aid or to the injury of the nerson whom he represents, (Salsbury v. Isre. 183 111, 505.) The rule is well established in equity that the relation To else to easier of the sand and lagranty measied mittake property is a fiduciary one, and the agent in the exercise of good faith is bound to keep his primaing lafermed on all maiters that say come to his knowledge pertaining of the subject matter of the agency. (Reiser v. Brendt, 329 III. 2I.) in agent must not put himself, during aid to tant of earswas neificon a hi reenes aid to some nations oft principal. To the latter belongs the exercise of all the skill, ability and industry of the agent. If a party employs an agent to make a pur-To vijeusit be is antitied to sail the skill, ability and he serve such agent to make the purchase on the best terms that can be had. (Cottom v. Malliday, 59 Ill. 176.) An agent cannot deal for his own advantage when the trust parchased for the principal, or because a and her or buyer of them, because of his confidential relation and his

duty to disclose to his principal every fact, circumstance or advantage in relation to the purchase which may come to his knowledge. (McDonelu v. Fithian, 1 dilm. 209; atrong v. Lord, 107 Ill. 25.) In agent cannot directly or inarectly acquire an interest in his principal's business without the principal's consent freely given and with full knowledge of every matter known to the agent which might in any way affect the principal's interest, and it is of no consequence that no fraud was intended or that no advantage was derived by the agent. (For v. simons, 251 Ill. 316.)" Lany other cases to the same effect might be cited, but the rule is too well settled to require further citations.

Under the facts of this case, as we find them, and the settled law bearing upon the facts, it is plain that the judgment for \$607.50 entered in the trial court against the altmans, appellants, must be reversed.

As to the counterclaim of the Altmans: Appellee, counterdefendant, received from the Altmans (11,500. The Altmans frankly concede that they must do equity by appellee and they admit that he is entitled, in addition to the \$9,000 that was paid to the receiver, to credit for certain items amounting to \$812.99, making the total amount of credits conceded to be due appellee \$9,812.99. There are two items that appellee claims he is also entitled to in any event, viz., \$60, that he spent in advertising the property "before Mr. Altman came into the picture," and \$750, which he claims he owes an attorney for services in securing the release of the Walsh note and the judgment thereon. Appellee did not testify that he paid the attorney \$750 for the services. We are of the opinion that appellants should allow appellee something for the services, but \$750 is an excessive amount. In our judgment \$375 would be a reasonable fee for the services and that amount is allowed. There is no good reason why appellants should be charged for the advertising item. As the claim of appellee for the \$500 note has been disallowed by our judgment, the amount of that note should be deducted from the

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on the facts of this case, as as find time, and the sertled law bearing upon the facts, it is plain that the juagment for \$607.50 entered in the trial court against the althous, appellants, must be reversed.

-refined pelloggi samentil on to mislandance out of aA infestions, received from any classes (11,000). Too classes from 27 concede that they must do equity by appelled and they admit that he is entitled, in addition to the 49,000 that was paid to the property or and on the contract of the policy of the polic the total amount of credits conseded to be due appelled \$9.812.99. there are two items that appelled claims he is also entitled to in any event, vis., \$50, that he spent in advertising the property natale all makes often and the process of the land and and and the colored he owes an attorney for services in securing the release of the Walin note and the judgment thereon. Appelled did not testify that he paid tadi nolnigo paj to era el . secivies ent rol 0793 yenrolla edl appellants should allow appellace something for the services, but \$750 is an excessive amount. In our julgment \$375 would be a reasonable fee for . services and that amount is allowed. There is no good reason on appellants should be charged for the advertising item. As the claim of appollee for the \$500 note has been disallowed out mort bejoubed se bluods sion jait to thuome out, inemphit who the

total amount received by appellee from appellants, leaving the net amount that he received from appellants \$11,000. The total amount of credits to which appellee is entitled is \$10,187.99, which deducted from \$11,000 leaves \$812.01, and appellants are entitled to judgment for that amount upon their counterclaim.

The judgment of the Municipal court of Chicago of \$607.50 in favor of Joseph E. Merrion, appellee, plaintiff in the court below, and against Joseph Altman and Adella C. Altman, appellants, defendants in the court below, is reversed; and judgment is entered here in favor of Joseph Altman and Adella C. Altman, appellants, upon the counterclaim, and against Joseph E. Merrion, appellee, in the sum of \$812.01.

JUDGMENT REVERSED; AND JUDGMENT HERE IN FAVOR OF APPELLANTS (COUNTERCLAIMANTS) AND AGAINST APPELLEE (COUNTER-DEFENDANT) IN THE SUM OF \$812.01.

Friend, P. J., concurs. John J. Sullivan, J., took no part in the decision of this case.

total enount received by appelles from appellants, leaving the net amount that he received from appellants (11,000, The total amount of credits to which appelles is entitled is \$10,187.99, which deducted from \$11,000 leaves \$318.01, and appellants are entitled to judgment for that amount upon their counterclain.

The judgment of the Manietysal court of Chiesgo of CCO7,90 in favor of Joseph E. Merrion, appelles, plaintiff in the court below, and sgainst Joseph Litman and Adella C. Altman, appellents, defendants in the court below, is reversed; and judgment is entered here in favor of Joseph Ciman and adella C. Altman, appellants, upon the counterclain, and against Joseph E. Merrion, appellants upon the sum of 4812.01.

IN THE SUM OF SELECT.

Picada F. J., roments.

41116

IN RE ESTATE OF WILLIAM H.

MYRA HAEGELE DRIVER, Objector and Appellant,

V.

MARTHA HAEGELE, Executrix and Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

307 I.A. 383

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

William H. Haegele died on July 9, 1931. By a will (date of the same not shown in the record) he left his entire estate in equal parts to his widow, Martha Haegele, and Myra Haegele Driever, a daughter by his first wife. They were named joint executrices and qualified as such in the Probate court of Cook county, but later the daughter resigned by leave of court. Martha Haegele, executrix (appellee), filed an inventory certifying that no real estate nor personal property belonging to the deceased had come to her hands, possession or knowledge. Myra Haegele Driever (appellant) filed exceptions to the inventory, in which she charged, inter alia, that deceased owned, at the time of his death, 3,443 of the 12,000 shares of the capital stock of the Haegele Ice Company, a corporation. In the Probate court the trial judge found that Haegele was the owner of the said 3,443 shares at the time of his death and ordered the executrix to file a supplemental inventory charging herself with said shares. The executrix prayed an appeal to the Circuit court, where, upon a trial de novo, the trial judge found that Haegele was not the owner of the said shares at the time of his death and ordered that all exceptions of Myra Maegele Driever to the inventory of the executrix be overruled and denied. Judgment for costs for \$21.50 was entered against the objector (appellant),

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MANTHA HARBIES, Executrin and appolles.

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William H. Mangels died on July 9, 1931. By a will (date at at state entire and the record) he left his antire estate equal parts to his widow, Martha Maegelo, and Myra Maegele Driever, and qualified as such in the Probate court of Cook county, but later the daughter resigned by leave of court, lartha haegale, fact on this anighties grotnevnt as belit . (colleges kiriuses estate nor personal property belonging to the decessed lad cone to her hands, possession or knowledge. Myra meagle briever (appellant) filed exceptions to the inventory, in this she charged, inter alia, that deceased owned, at the time of his death, 3,443 of the 12,000 shares of the capital stock of the Maegela Ice Company, a corpor-In the Probate court the trial fudge found that flaceole was the owner of the said 3,445 shares at the time of his death and ordered the executrix to file a supplemental inventory cherging herself with said shares. The enecutrin prayed an appeal to the Circuit court, where, upon a trial de novo, the trial judge court, To each end to require blar end to remuo end for rew elegent fail his death and ordered that all exceptions of Myra day belever to the inventory of the executrix be overruled and denied. Judgment for costs for \$21.50 was entered against the objector (appellant),

which judgment was satisfied in open court by appellant and an order to that effect was entered. Eighteen days later appellant served a notice of appeal and subsequently perfected her appeal in this court.

Appellant contends that the court erred in holding that the said stock did not belong to the estate of William H. Haegele; that the instrument introduced in evidence (hereinafter set out in full) is merely an appointment of an agent and a direction to him to bring about the transfer of the stock in the future; that since the principal died before the directions were executed the agency terminated, and the stock belonged to the deceased at the time of his death. Appellee contends that the instrument in question "is a direction by beneficiaries, one of whom was William M. Maegele, to David S. Horwich, the trustee, transferring and vesting said Haegele's ice stock interest in his wife; and Secondly, in any event, the evidence, both oral and written conclusively shows that William M. Haegele, during his lifetime, divested himself of any interest in the stock in question to the sole benefit of his wife Martha Haegele."

The material facts in the case are not in dispute. William H. Haegele owned 3,443 shares of stock in the Haegele Ice Company. On October 20, 1930, David S. Horwich, attorney, was appointed a trustee by all of the stockholders of the Haegele Ice Company. The instrument creating the trusteeship is not in evidence, but Horwich testified that by the terms of the trust he was to liquidate the assets and distribute the proceeds to the stockholders and that by May 1, 1931, the corporation had been practically liquidated. The 3,443 shares of stock were then in the hands of the Prudential Trust and Savings Bank as collateral. On May 22, 1931, approximately two months prior to the death of Haegele, the latter "summoned" Horwich to Twin Lakes, wisconsin, where Haegele was then residing, and when Horwich arrived at the home of Haegele at that place he found there, in addition to Haegele, Henry Haegele, a brother of

which judgment was striction in open court by appellant and an order to that effect was entered. Dightsen days later appellant served a notice of appeal and subsequently perfected her appeal in this court.

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William; Mr. and Mrs. Schnitzer; Louise Kircher, a sister of William; and the appellee. Louise Kircher was a sister of William and Henry, and Mrs. Schnitzer was a daughter of Louise. Horwich (called as a witness by appellant) testified that William Maegele told him that "he wanted to make arrangements about the Twin Lakes property, the vacant lots. Q. What did he say, if anything, with respect to this stock or his interest in the corporation? A. He said his daughter was getting forty thousand dollars in insurance money and she was amply protected. He wanted me to draw a document, as trustee, that I would be directed that that stock the bank was to return, that stock was to be paid to Martha Maegele." The witness then stated that at the direction of Maegele he drew up the following instrument:

"May 22, 1931.

- "(1) David S. Horwich, trustee, is hereby directed to take steps at his discretion to secure from the Frudential bank, stock, insurance, etc., placed as security by William, Henry, and Charles Haegele, which deposits were made for the benefit of Haegele Ice Co.
- "(2) David S. Horwich, trustee, is hereby further directed to consider the common stock in the Maegele Ice Company, now in the name of William Maegele and held by the Prudential Bank, as stock which the bank was to return to William Haegele, and to place so far as possible the interest of William Haegele in said stock in the name of Martha Maegele, with Martha Maegele to have full authority to vote the said stock, and the securities purchased by David S. Morwich, trustee, from the funds held for the payment of said stock shall be turned over to Martha Maegele when the stock at the bank shall have been returned or cancelled together with any monies which may be payable later on the said stock.
- "(3) David S. Horwich, trustee, is hereby directed to pay to William Haegele the sum of \$50.00 per month for the board and upkeep of Charles Haegele until all of Charles Haegele's stock in the Haegele Ice Company, has been retired at the rate of \$2.00 per

William; Ir. and Mrs. Schmitzer; Louise Mircher, a sister of Milliam; and the appellee. Louise Mircher was a sister of Milliam and Meny, and Mrs. Schmitzer was a daughter of Louise. Morwich (galled as a witness by appellant) testified that William Massele teld him that "he wanted to make arrangements about the mix lakes preservy, the vacant lots. Q. That did he say, if anything, with respect to this stock or his interest in the corporation? A. He said his daughter was getting forty thousand dollars in insurance money and she was amply protected. He wanted me to draw a document, as trustee, that I would be directed that that stock the bank as to return, that stock was to be paid to Macsele. The vitness then stated that at the direction of Macsele, he drew up the following instrument:

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 - "(3) David S. Horwich, trustee, is hereby directed to pay to William Haegele the sum of \$50.00 per month for the board and the sum of the court in the sum of \$2.00 per the sate of \$2.00 per the sate

share, and after such time, Louise B. Kircher, Milliam Haegele and Henry Haegele, are to share the board and clothing and medical expense of said Charles Haegele, share and share alike as long as said Charles Haegele lives.

"All by order of the undersigned.

"David S. Horwich,
Trustee.
"William Haegele,
"Henry Haegele,
"Louise B. Kircher."

The witness further testified that "upon William Haegele's death I collected \$23.861, which was the net amount due under the policy, and distributed the money to the common stockholders and delivered the pro rata amount due on Villiam Haegele's stock, pursuant to this letter of direction, to Martha Haegele;" that Martha Haegele never had the 3.443 shares of stock in her possession and that the stock certificates were still in the bank's possession. In respect to the shares of stock the witness further testified: "The bank had agreed to return the 3443 shares to William Haegele together with the stock that Mrs. Kirchner, a sister, had up as collateral with the Haegele Ice loan. They had agreed to return that collateral to the owners if I presented them with a certified copy of a resolution from the bookkeeper of the Lincoln Ice Company guaranteeing to indemnify the bank on the bond issue. In other words the Lincoln Ice Company were to be liable to the same extent as the Haegele Ice Company, the maker of those bonds. Q. Then did you indemnify them to that extent? A. I presented the certified copy of that resolution to the bank and gave them sixty days to return William Haegele's stock. Q. To you as trustee? A. Yes, to me as trustee, which they did not do." Harry [Henry] Schnitzer testified that on May 22, 1931, "we were called out to win Lakes where Mr. Haegele resided at that time because they were dividing some property up that my mother-in-law, Mrs. Kirchner, was interested in. When we got out there we got finished with dividing the property and Haegele stated at that time that he wanted this ice stock and all proceeds to be turned over to

share, and after such time, Louise b. Mrcher, Allies Moogele and Menry Maegele, are to share the board and elathing and medical expense of said Charles Moegele, share and share allies as long as said Charles Maegele lives.

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"David B. dorvich,
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I disob a olegosh saillid nogu tedi bellitest redi ut esemiw edl collected \$23,661, which was the not a count due under the policy, and and hereviled bas steblorisois normed end of years end bejuditable pro rate amount due on !!!!!em Haegele's stock, pursuant to this letter of direction, to Martin Magnete; a that Mar Magnete never Moode out fail has noiseesee and in lock to serade \$44.5 edt bad certificates were still in the band's possession. In respect to the beens but the edil" theilitet teriner fare beit took to serse to return the 3443 shares to Milliam Mangele together with the stock that Mrs. Mircimer, a sister, and up as collateral with the Macgola. Ice loan. They had agreed to return that collateral to the sweers if I presented them with a certified copy of a resolution from the bookkeeper of the Limedla Dee Company guaranteeing to indomnify the bank on the bond issue. In other words the Lincoln Iss Company were to be liable to the same extent as the Magrale Lee Company, the maker of those bonds, Q. Then did you indemnify them to that extent? I presented the certified copy of that resolution to the bank and gave them sixty days to return william Macgale's stock. Q. To you as trustee? A. Yes, to me as trustee, which they did not do." Marry [Memry] Schmitzer testified that on May 22, 1931, "we were called out to Twin Lakes where Mr. Hassels resided at that time because they were dividing some property up that my mother-in-law, Mrs. Kirchner, was interested in. When we got out there we got Finished with dividing the property and decords whether the of reve benut ed of absence IIs bus shoots self the want of

his wife at that time. Martha Haegele. A document was drawn up at that time which I read because I believe my mother-in-law signed it at that time and we usually read practically everything she signed. He did state at that time, in fact he has stated that the insurance was turned over to his daughter and the only thing he had left, outside of the Twin Lakes property, was the stock which he wanted turned over to his wife. Q. I will show you Respondent's Exhibit No. 1, and ask you if that is a copy of the instrument that you mentioned? A. That is right. Q. Did you see that signed by William Haegele? A. I saw it signed and I read it before it was signed." Appellant's counsel did not cross-examine the witness save to show the relationship of Louise Kircher and the Schnitzers to William Haegele. Mrs. Schnitzer testified that on May 22, 1931, "my uncle asked us to come over to his Twin Lakes home because he was very anxious to divide the property that the Haegele Ice Company owned and also to make arrangements for his wife, Martha Haegele, to receive the money due on the stock of the Haegele Ice Company. He said that his daughter was getting all of his life insurance policies and he wanted her to get whatever money was due on the stocks of the Haegele Ice Company. Q. He wanted her to get them. who do you mean by 'her'? A. Martha Haegele, his wife. Q. What was done? A. A paper was drawn up, which my husband read and my mother signed on May 22, 1931. Q. I show you this document, Respondent's Exhibit No. 1, and I ask you to say whether this was the paper that was signed? A. Yes, this is my mother's signature, * * * Mr. Matheny [attorney for appellant]: No cross examination." Appellant testified that on May 1, 1931, the 3,443 shares of stock of the Haegele Ice Company were "up as collateral at that time with the bank, together with his life insurance policies;" that she was the beneficiary in the life insurance policies; that she knew her father owned the stock because it was up with the bank with the life insurance policies as collateral; that she did not know, personally, that the stock "was up with the bank," but she learned that fact after the death of

his wife at that time, Martha Maegele. A decument was drawn up at that time which I read because I believe my nother-in-law signed it at that time and we usually read practically everything she signed. He did state at that time, in fact he has stated that the insurance was turned over to his faughter and the only thing he had left, outside of the Twin Lakes property, was the stock which he wanted turned over to his wife. Q. I will show you Respondent's Exhibit No. 1, and ask you if that is a copy of the instrument that you mentioned? A. That is right, Q. Did you see that cigned by was I seed at been I but beingle the was I .A Telegent maillim signed." Appellant's course did not cross-exame the witness save to show the relationship of Louise Wireher and the Johnitsers to William Macgele, itrs. Scinitzer testified that on May 28, 1911, any uncle asked us to come ever to his lain Lekes home because he was very anxious to divide the property that the Engels Ice Compeny owned and also to make arrangements for his wife, derthe Haggels, to receive the money due on the stock of the Masgele Lee Company. He said that on one solution consumumi ship aid to the amitter saw retrigues and he wented her to get whatever money was due on the stocks of the Kaegele Ice Company. Q. He wanted her to get them, the deyou meen by 'hor '? A. Martha haggele, his wife. Q. Mat was done A. muer was drawn up, which my husband read and my mother signed on Hope to 1931. I . I can be a second of the control of the No. 1, and I ask you to say whether this was the paper that was signed? A. Yes, this is my mother's signiture. * * # Mr. Matheny [attorney for appellant]: No cross examination, " Appellant testified that on May 1, 1931, the 3,443 shares of stock of the Maegele Ice Company were "up as collateral at that time with the bank, together with his life insurance policies;" that she was the beneficiary in \$5000 at least the small to me and we find an inline assumed will out because it was up with the bank with the life insurance policies as wallacters; the also did not more personally that the wheat when To an all the took the Language that they from the land of her father.

Whether we decide the guestion involved in this appeal solely by interpreting the instrument dated ay 22, 1931, or by interpreting that instrument in the light of the oral evidence as to what transpired at the time of the execution of the instrument, our decision of the question involved would be the same, viz., that Milliam Maegele at the time in question divested himself of all interest in the stock in question and assigned his interest in the stock to his wife. To hold otherwise would be to defeat the plain intent of Maegele. We do not deem it necessary to decide whether the assignment is legal or equitable in its nature. "The doctrine is well settled, that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good/law or in equity only." (Morris v. Cheney, 51 Ill. 451, 454. See, also, Savage v. Gregg, 150 Ill. 161, 168.) Other cases to the same effect might be cited if it were necessary. That probate courts have equitable jurisdiction in matters pertaining to the administration of estates, see the opinion of Mr. Justice Wilson in In re Estate of Kinsey, 261 Ill. App. 481, 487, where the rule is stated and cases are cited in support of it.

In support of her argument that Maegele, by the instrument in question, merely intended to bring about an assignment of the stock to appellee in the future, appellant states in her brief:
"While the stock was so deposited as collateral, David S. Morwich, the trustee for the corporation, proceeded to liquidate its assets and to distribute the proceeds. The pro rate portion due on the 3443 shares deposited as collateral was paid to William H. Haegele during his lifetime, and after his death, the cash accruing was paid to Martha Haegele on the theory that the stock had been assigned to her by the instrument above set forth including the proceeds of insurance on the life of William H. Maegele payable to the corporation." (Italics ours.) The alleged fact stated in the italicized part of the foregoing is not sustained by the record. Turning to

her father,

Whether we decide the question involved in this appeal solely by interpreting the instrument dated . 17 22, 1911, or by conclive I to cut to that that the wastrant that anti-rareful as to what transpired of the time of the execution of the instrument, our decision of the question involved sould be the same, viz., ils to licenti intervis nuiters ni ente et te eleges meilli tati edt af factefal eid bengisen am neifesen af Moore edt af teersjal stock to his wife. To hold otherwise would be to defeat the plain redrain ablock of gressess it mean see so so see see all the int the assignment is legal or equitable in its mature. "The destrine is well settled, that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good/law or in equity only." (Forris v. Cheney, 51 Ill, 451, the day, along terms of forms III. It's lift, but the same to the same effect might be eited if it were necessary. bate courts have equitable juristiction in metters pertaining to the administration of satates, see the opinion of it. Justice Wilson in In re Astate of Minsey, tol Ill. sp. 481, 487, where the rule is stated and cases are eited in support of it.

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"This is a proceeded to liquidate its assets the trustee for the corporation, proceeded to liquidate its assets will be a state of the corporation on the theory that the stock had been assigned to arthur Maegele on the theory that the stock had been assigned to a the life of "illiam M. Maegele payable to the corporation." It is our in the foregoing is not sustained by the record. Turning to

the page of the record that appellant cites in support of the statement, we find that Horwich testified: "I had to pay over to william Haegele two dollars per share on the 3443 shares * * *.

I paid that to him as a stockholder." It appears from the record, however, that Horwich, when he made the above statement, was referring to a time prior to the date of the execution of the instrument in question and when he, as trustee, was engaged in liquidating the corporation. He testified, as heretofore stated, that the corporation was practically liquidated on May 1, 1931, that then "all the assets that remained were a few dollars that we were trying to collect on the accounts receivable." The instrument in question was not signed until May 22, 1931.

The decision of a motion of appellee to dismiss this appeal was reserved to the hearing. The motion will be denied.

The judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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of the record that appellant cites in support of the initian Haegele two dollars per share on the 5-45 shares as a coord, to to him as a stockholder." It appears from the record, ever, that Horwich, when a time prior to the date of the execution of the hastrucent in question and when he corporation, he testified, as heretoff. Little to was practically liquidated on key.

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THE PEOPLE OF THE STATE OF ILLINOIS ex rel. CHARLES J. MacGOWAN,

Appelles,

APPEAL FROM SUPERIOR

THE CHICAGO PARK DISTRICT Municipal Corporation,

Appellant.

307 I.A. 383

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People, plaintiff, ex rel. Charles J. MacGowan, brought a mandamus suit against the Chicago Park District, a municipal corporation, defendant, seeking a writ of mandamus commanding defendant to pay to relator the sum of \$500, which he claims is due him as the balance of his salary as superintendent of employment of the West Chicago Park Commissioners for the period from July 1, 1932, to April 30, 1933. After a trial by the court judgment was entered ordering that a writ of mandamus issue directed to the Board of Commissioners of the Chicago Park District commanding them to meet as the Board of Commissioners and to pass such legislation as may be necessary to provide for the immediate payment to relator of the sum of \$500 and to do any and all things which may be necessary to be done to enable relator to be paid said sum by defendant. Defendant appeals.

Plaintiff filed an appearance in this court and after defendant had filed its brief we allowed plaintiff, upon its motions, two extensions of time in which to file its brief, but it failed to file one. The able and experienced counsel of the relator has apparently abandoned the defense of the judgment.

The petition, in substance, alleges the creation of the West Chicago Park Commissioners; the adoption of the Act relating to Civil Service in Park Systems and the creation of a Civil Service Board of the said Commissioners under said Act; the adoption on April 27, 1927, by the said commissioners of a resolution appointing relator superintendent of employment of

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MR. JUSTICE SCAPLAR BULLVERED THE OFFRICK OF THE COURT,

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The People, plaintiff, ex rel. Chirales J. Rescoven, brought a manismus suit against the Chirage Park District, a municipal corporation, defendant, seeking a writ of mendamus commanding defendant to pay to relator the sum of \$500, which he claims is due him as the balance of his salary as superintendent of employment of the West Chirage Park Consissioners for the period from July 1, 1932, to April 30, 1933. After a trial by the court judgment was entered ordering tint a writ of mendamus by the court judgment was entered ordering tint a writ of mendamus issue directed to the Board of Commissioners of the Chirage Park District commanding them to meet as the Board of Commissioners and to pass such legislation as may be necessary to provide for the immediate payment to relator of the sum of \$500 and to do any and all things which may be necessary to be done to enable relator to be paid said sum by defendant. Defendant appeals.

Plaintiff filed an appearance in this court and after defendant had filed its brief we allowed plaintiff, upon its motions, two extensions of time in which to file its brief, but it failed to file one. The able and experienced counsel of the relator has apparently abandoned the defense of the judgment.

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the Board of West Chicago Park Commissioners for a period of six years at an annual salary of \$6,000; the assumption of the duties of the position by relator on April 28, 1927; the adoption of a resolution on June 30, 1932, by said commissioners directing the Civil Service Board to place in effect on July 1, 1932, a wage reduction of approximately ten per cent as to all employees except certain union em loyees whose wages had been previously reduced in the same proportion; that as a result of the said adoption relator's salary was reduced ten per cent for the period from July 1, 1932, to April 30, 1933; that the West Chicago Park Commissioners did not pay relator his salary as provided in the resolution appointing him and that on April 30, 1933, they owed him \$500. The petition then alleges the creation of the Chicago Park District and its coming into legal existence on May 1, 1934; alleges that relator requested the commissioners of the Chicago Park District to pay him the alleged balance due on his salary and their refusal to do so; alleges that as said superintendent relator was a municipal officer within the meaning of Section 11, Article 9, of the Illinois Constitution of 1870, and that his salary could not be reduced during his term of office; that he had vested and property right in the same of which he was unlawfully and arbitrarily deprived by the unlawful act of the commissioners of West Chicago Park District; that the Chicago Park District has now and always had sufficient available funds out of which to pay relator.

The amended answer of defendant, Chicago Park District, is a lengthy one, but in our view of this appeal it is only necessary to refer to the parts of the answer wherein laches and estoppel are raised. The answer alleges that relator is guilty of laches; that he accepted the reduced salary from July 1, 1932, to april 30, 1933, without protest, took no action against the best Chicago Park Commissioners to restore the salary; permitted saidcommissioners to go out of existence May 1, 1934, without making any demand on them or taking any action in reference to the salary; that after the

the Board of West Chicago Park Commissioners for a period of six years at an annual salary of \$6,000; the assumption of the auties of the position by relator on April 20, 1927; the adoption of a resolution on June' 30, 1932, by said commissioners directing the Civil Service Board to place in effect on July 1, 1932, a wage reduction of approximately ten per cent as to all employees energicertain union on loyaes whose wages had been previously reduced in the same proportion; that as a result of the said adoption relator's salary was reduced ten per cent for the period from July 1, 1932, to April 30, 1933; that the West Cineago Park Jonustoners did not pay relator his salary as provided in the resolution appointing him and that on April 30, 1933, they ewed him \$500. The petition then alleges the creation of the Chicago Park District and its coming into legal existence on May 1, 1934; clleges that telator requested the comments of the Chicago Park District to pay him the alleged balance due on his salary and their refusal to do so; alleges that as said superintendent relator was a municipal officer within the meaning of Section 11, Article 9, of the Illinois Constitution of 1870, and that his salary could not be reduced during his term of office; that he had vested and property right in the same of which he was unlawfally and arbitrarily deprived by the unlawful act of the commissioners of west Chicago Park District; that the Chicago Park District has now and always had sufficient .v Il wie funds out of which to pay relator.

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Chicago Park District came into existence on Pay 1, 1934, relator waited until June 30, 1937, a period of three years, before filing this petition, and waited until November 30, 1937, before he caused summons to be issued; alleges that the petition sets forth no facts excusing failure to file the petition earlier or justifying the delay; alleges that since the occurrences in question the west Chicago Park Commissioners ceased to exist and were superseded by the Chicago Park District; that payment of the money claimed would create confusion and disorder and disarrange public service by reason of delay, lapse of years and change of circumstances; that conditions existing in 1933 in reference to the corporate structure of the West Chicago Park Commissioners have ceased to exist; that the action requested would cause confusion in the handling of funds of the Chicago Park District; that no demand was made by relator upon defendant prior to the filing of the petition; that no facts are alleged showing a legal duty of defendant to perform the acts sought to be performed nor by whom the acts requested should be performed and whether such acts can be legally performed by such persons; that defendant has no funds in its possession from which relator can be legally paid; that relator voluntarily accepted the reduced salary during the period in question and by his action he waived his right to said additional amount; that the resolution of June 30, 1932, by the West Chicago Park Commissioners requested and did not direct the Civil Service Board to put said wage reduction into effect; that relator was a member of the said Civil Service Board and its secretary; that at a meeting of the said board held on July 28, 1932, at which relator was present and acted as secretary, the letter from the commissioners and the resolution adopted by the commissioners requesting the wage reduction was read and the members of the said board, including relator, voted to enforce and put into effect the reduction as requested, and directed relator as superintendent of employment to put said policy into effect; that relator, as said superintendent, put said policy into effect, requeing the pay of

Chicage Park Mistrict care into emistance on buy 1, 1954, relator waited until June 30, 1937, a period of three years, before filling this petition, and waited until Movember 30, 1937, before he caused on diver also notified out that the path along the forth an gulyilizat no reliese coldine out elif to erulist galasse stori the delay elleges that since the courrences in question the lest Chicago Fark Commissioners ceased to exist and were superseded by the Chicago burk District; that payment of the money claimed would erests confusion and disorder and disarrange public corvice by reason arolidate of years and change of circumstances; that conditions stating in 1933 in reference to the corporate structure of the West Chicago Park Consissioners have coased to ealst; that the setion cut to show to guilbreed wit in the confuse scare alway belouper Chicago Perk District that no demand was made by relater upon ers after on field anold lipe odd to anilit odd of rothe tasheren inguos also and areling of imabusleb to with lagel a universe begalle begroized at bluode research atos of more yd ron bemrofred ed of and whether such acts on be legally performed by such persons; that ed use rejelet field; more medesessed at a spurt on and inshereb legally poid; that relator volunterily accepted the reduced salary idgly win haviow on motive aid ye bus motiveup at being out animals to said additional smount; that the resolution of June 30, 1932, to Jostib Jon bib bas betreuper cremotetamed Mrsq oresido teow edj the Civil Service Board to put said wage reduction into effect; that -cross at i bus brook estree livid bise and to reduce a caw rotaler is 1919, 88 year no blad board blaz edd to gnijeem a is tadi :yrsj more relater was present and acted as secretary, the letter from the commissioners and the resolution adopted by the commissioners bice off to creamen off has been sew noticular egow end guideesper board, including relator, voted to enforce and put into effect the To inebneinireque es roisier beierth bas beizeuper as nolieurer omployment to put said policy into effect; that relator, as said superintendent, put said policy into effect, reducing the pay of

all employees, including relator, ten per cent; that during the period from July 1, 1932, to April 30, 1933, relator certified the pay rolls as to correctness, as required by the provisions of the Civil Service Act, showing the salaries of all employees, including his salary, in the amounts so reduced, and he certified to the correctness of the pay rolls in said amounts.

A number of points are made and strenuously argued by defendant in support of its contention that the judgment of the trial court should be reversed, but in our view of this appeal it is only necessary to consider two of the points: (1) "The plaintiff is guilty of such laches as bars his right to the relief sought." (2) "The plaintiff is estopped by his own action from claiming the monies alleged to be due him." These two points are so clearly meritorious that it is not difficult to understand why the relator abandoned the defense of the judgment.

The West Chicago Park Commissioners ceased to exist on april 30, 1934, and on May 1, 1934, the Chicago Park District came into existence. On April 28, 1927, the West Chicago Park Commissioners appointed relator superintendent of employment of said commissioners for a period of six years, at a salary of \$6,000 per year. The Civil Service Board of the said commissioners consisted of one James, who was also a Park Commissioner and president of the board; one Roehler, also a Park Commissioner, and relator. Relator was secretary of the Civil Service Board. On June 30, 1932, because of the great depression and the conditions resulting therefrom, and in the interest of economy, the commissioners of the West Chicago/District passed a resolution requesting the said Civil Service Board to reduce the pay of all officers and employees ten per cent. On July 28, 1932, at a special meeting of the Civil Service Board, which was attended by James and relator, a resolution was presented to the said board reducing the pay of all officers and employees ten per cent, except in the case of certain union employees, who had had their pay previously reduced. James and

all employees, including relator, ten per cent; that during the period from July 1, 1952, to April 30, 1935, relator certified the pay rolls as to correctness, as required by the provisions of the Civil Dervice Act, showing the salaries of all employees, including his salary, in the amounts so reduced, and he certified to the correctness of the pay rolls in said amounts.

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Friend, P. J., and Sullivan, J., concur.

Anderson cases.

The judgment of the Superior court of Cook county is reversed.

JUDGMENT REVERSED.

relator voted in Taver of the resolution and it was passed. The resolution also directed relator, as superincendent of employment, to put the salary reduction into offeet. The minutes of this acquir sair poru bas vrapersos as robelet ve bearis ere raiseem Stand he adelited the correctness of the minutes, after the paid special mosting relator proceeds to earry the resolution into creat associone like to you will conter of aband farminged and beforelb bas ten per cent. Relator was heed of the Civil Service Degertment and -fraged sid of amostes lie to estrates ent because tribages dose al beigeon has beviceer off thes wer net me all midulent them salary checks in the reduced emount for the balance of the ported of his ansolatment, vis., from July 1, 1972, to April 30, 1983. Masch only fant toethe salt of themstale as we work that the one beilings at ab all animation to an object of Illa di dammer as we will be the company as we will be the company as the company on the check, Relator accepted the checks in savment of his salary and indorsed and cashed them. In accordance with the requirements of the act relating to Civil Service in Park dystems on certificat to the correctness of the pay rolls of the Fark District, which pay ratent out , invoke besuber edt at grafus mo eld bebuient affor ban array count asw dotals . Titl . Of omet lithus belit ton any thus two manuas after the west Chicago Perk Commissioners had esseed to exist. Juring the period in question relator took no legal action in regard to his pay, It would be difficult to imagine a stronger in case of laches and estoppel arainst a relator than is present in the instant suit, we have herefore passed upon several cases (Poople or rol. Malvey v. City of Chicago, 292 III. 1pp. 539: Lett. App. 259; abstract opinion) in which we held that the demands made upon certain contact of the writ of mandames now bluow aumabness to the out to sensual ont the said corporations. In our opinion the instant claim is the core communication than eye the cirtus in the latery and

Friend, P. J., and Sullivan, J., concur.

GEORGE J. COMMELEEX,
Appellee,
Appellee,
COURT OF CHICAGO,
Appellant,
Appellant,
COURT OF CHICAGO,
APPE

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an action of forcible detainer against defendant. The case was tried by the court without a jury and there was a finding that defendant was guilty of unlawfully with-holding from plaintiff the possession of the premises and that the right to the possession of the premises was in plaintiff. Defendant appeals from a judgment entered upon the finding.

Defendant obtained possession of the premises under a written lease dated December 14, 1938, for a term of one year beginning January 1, 1939, and ending December 31, 1939, at a rental of \$25 per month from January 1 to March 31, and \$50 per month from April 1 to December 31, 1939. The premises consist of certain vacant lots, and the lease provides that they were to be occupied by defendant for the sale of used automobiles.

instant one. Defendant's counsel constantly objected to questions put by plaintiff's attorney, and it was difficult to obtain from defendant's counsel the theory of the defense. After a careful reading of the transcript of the evidence we find that defendant's counsel made two points in support of his contention that there should be a finding for defendant. The first was that the written lease between the parties was not admissible because it violated the statute of frauds. There was not the slightest merit in the point and it has not been urged in this court. The second point urged was that plaintiff's evidence showed that a hold-over tenancy had been created in favor of defendant. That point was also without the

MR. JUSTICE SCANLAGE BORIVERSD TOR OFFICE OF THE CURRY.

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Defeadant obtained possession of the gremises under a written lease dated December 14, 1932, for a term of one year beginning January 1, 1939, and emiling December 31, 1939, at a rental of \$25 per month from January 1 to March 31, and 250 per month from April 1 to December 31, 1939. The premises consist of certain vacant lots, and the lesse provides that they were to be compiled by defendant for the sale of used automobiles.

We do not often find an appeal so devoid of merit as the instant one. Defendant's counsel constantly objected to questions put by plaintiff's attorney, and it was difficult to obtain from defendant's counsel the theory of the defense, After a gareful reading of the transcript of the evidence we find that defendant's counsel made two points in support of his contention that there should be a finding for defendant. The first was that the written lease between the parties was not admissible because it violated the statute of frauds. There was not the slightest merit in the point statute of frauds. There was not the slightest merit in the point of that it has not been urged in this court. The second point urged was that diministration of defendant. That point was also without the

slightest merit and has not been urged here. Defendant, after he had been served, on December 3 or 4, 1939, with a notice to vacate, attempted to create a hold-over tenancy by mailing to plaintiff a check on which he had indorsed: "Payment for rent of lot at 4747 W. Madison St for month of January 1940," but plaintiff refused to accept the check and immediately returned it by registered mail to defendant. Defendant refused to receive the registered letter and it was returned by the post-office department to the sender, plaintiff. In the trial court, defendant's counsel, in support of his argument that a hold-over tenancy had been created, made the farfetched point that plaintiff had failed to tender to defendant in open court the check and therefore a hold-over tenancy had been created. Defendant in this court contends: (1) "Where premises have been leased to a prospective tenant, who is unable to obtain possession by reason of a former tenant holding over after his term expired, the right to maintain the action vests in the new tenant alone," and (2) that it was "incumbent on the plaintiff to prove that the defendant was in actual possession of the premises at the time the suit was instituted." Neither of these points was urged or presented in the trial court and under the settled rule they cannot be raised here for the first time. We may say, however, that there is no merit in either point. There was no evidence that a lease was ever made by plaintiff to a prospective tenant. The only basis for point (1) is the testimony of defendant that in 1940 he called up the home telephone of plaintiff and plaintiff's wife told him that they had rented the place, in November, to someone else, and that on December 3 or 4, 1939, plaintiff told him that he had rented the place to someone else. The burden of proof was on defendant to show that someone other than plaintiff was entitled to the possession of the premises at the time of the commencement of this action, and his testimony utterly fails in that regard. As plaintiff argues, even if this testimony of defendant were believed, and if it were assumed that plaintiff had rented the premises to

slightest morit and has not been urged here. Defendant, after he had been served, on December 3 or 4, 1939, with a notice to vacate, a Tituisia of miliam by want to one of the state of bottom to check on which he had indorsed: "Psyment for rent of his 4747 W. Madison St for month of Jenuary 1940," but mlaintiff refused to of liam beretained to be turned at the real state of the seas and the defendant. Defendant refused to receive the registered letter and it was returned by the nont-effice department to the sender, plaintiff. In the trial court, defendant's counsel, in support of his argument that a hold-over tenancy had been created, made the farat inshabled of rebust of belief bad Thintely Jadi Intog bedote? open court the check and therefore a hold reveney had been and any arrival (1) remained processes and and analysis and any have been leased to a prospective tenant, who is unable to obtain possession by reason of a former temant holding over after his term thaned wen end ni steev notion end nighten of thigh end benigne stone," and (2) that it was "incumbent on the plaintiff to prove that the defendant was in actual possession of the premises at the begun aw since each to restituted." Best track was until me the each to me the track of the trac or presented in the trial court and under the settled rule they tant the raised here for the first time. We may say, however, tant a fadd sendit on as stand, There was no evidence that a The only lease was ever made by plaintiff to a prospective tenant. Orel at felt thehereby to womitest add at (1) inter for aland selled up the home telephone of plaintiff and plaintiff with the him that they had rented the place, in Movember, to someone clac, and that on December 3 or 4, 1939, plaintiff told him that he had rented the place to someone else. The burden of groof was on to shell the war will also that the plant the constant of January 100 In approximation of the cold of the sections will be adjacenessed and this action, and his testimony utterly falls in that regard. bevelled ergues, even if this testiment of defendant were the of secimong sub between bad lilitately taut because over it it bus

someone other than defendant, such tenancy might have commenced at a later period than the time of the commencement of this action. The trial court, in view of the character of the defense, might well have refused to believe this testimony of defendant. Mis attempt to create a hold-over tenancy after he had been served with a notice to vacate tends to show that he would resort to any expedient to hold possession of the premises. Point (2) is a bold contention, in view of the fact that defendant's counsel, in the trial court, argued that defendant was a hold-over tenant. Furthermore, defendant took the stand in his own behalf and his able and adroit counsel failed to ask him a single question on the subject as to who was in possession of the premises at the time of the commencement of the suit, or at the time of the trial. As plaintiff's counsel argues, the manner in which this suit has been fought is a strong circumstance tending to show that defendant is still in possession. As the trial court stated, the defendant would not be defending the suit if he were not in possession of the premises.

The defense to plaintiff's suit has been a technical one from the start of the proceedings. There is no merit in this appeal and the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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JURGMENT AFFIRMED.

Friend, P. J., and Sulliven, J., concur,

40623

MABEL C. WEIDEMANN,
Plaintiff,

OLOF A. AFDERSON et al.,
Defendants.

LENA AKENEBURG,
Appellee,

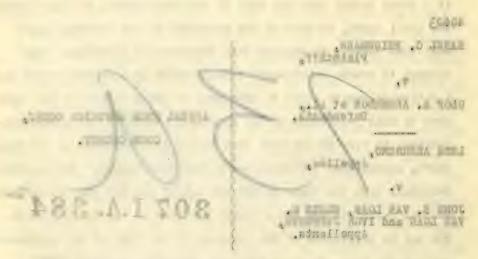
JOHN S. VAN LOAN, ELSIE M.,
VAN LOAN and IVOR JEFFREYS,
Appellants.

3071.A.384

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal respondents John Van Loan, Elsie M. Van Loan and Ivor Jeffreys, seek to vacate an order entered upon the amended petition of Lena Akerberg, directing them to account for rents collected during the statutory period of redemption. Her petition was filed in the Superior court in this cause, which was a foreclosure proceeding entitled Weidemann v. Anderson, No. 573658.

Lena Akerberg's amended petition alleged substantially that she was the holder of a \$500 bond secured by the trust deed fore-closed in this cause; that on Pebruary 28, 1933, Milton Johnson was appointed receiver to collect the rents and make disbursements with reference to the property foreclosed herein; that on ugust 10, 1936, a decree was entered confirming the master's report of sale and distribution, which said decree also ordered that a deficiency judgment for \$33,253.98 be entered in favor of the plaintiff successortrustee, that "the Receiver heretofore appointed in this cause be continued with all the rights and powers heretofore vested in and conferred upon him" and that "all moneys collected by and accrued to the said acceiver until the expiration of the statutory period of redemption be applied *** toward the payment of the deficiency;" that "on the first day of september, 1936, John S. Van Loan and Elsie E. Van Loan presented *** their sworn petition in and by which *** they



MR. JUBTICH DULLIVAN DULLYMUN THE DEISTER OF THE COURT.

By this appeal respondents John Van Loan, Made M. Van Loan and Iver Jeffreys, seek to vacate an order est red apon the amended petition of Lene Merberg, directing them to secount for rents collected during the statutory period of redemption. Let petition was filed in the superior court in this cause, which was a foreclosure proceeding entitled Weidemann v. Inderson, No. 573658.

lone thereof's amended petition alleged substantially that she was the holder of a \$500 bend secured by the trust deed forest closed in this cause; that on February 45, 1353, illien Johnson sas appointed receiver to collect the rents and make all bursements with reference to the property foreclosed hereing that on ingust 10, 1736, a decree was entered confirming the master's report of sale and airtibution, which said decree also ordered that a deficiency judgment for #33,273.93 be entered in favor of the plaintiff successor—trustee, that "the Receiver heretofore appointed in this cause he confirmed with all the rights and powers heretofore vested in and conferred upon him" and that "all moneys collected by said secrued to the said Acceiver until the empiration of the statuory period of the said Acceiver until the empiration of the statuory period of

stated to the court that they had acquired the equity of the property herein foreclosed and subsequently did redeem such property from the foreclosure sale *** and because of said redemption they asked the court for an order directing the Receiver, Milton Johnson, to turn over possession of said premises to them immediately;" that "by virtue of said sworn petition and statement of facts therein contained, namely, that a redemption had been made by said John S. Van Loan and Elsie W. Van Loan, an order was entered on the aforesaid first day of September 1936 *** requiring the Receiver to surrender immediate possession to said John S. Van Loan and Elsie M. Van Loan, and directing the said Receiver to file his final account and report within fifteen * * * days, said order of September 1, 1936, finding as a fact from the sworn petition of the said John S. Van Loan and Elsie M. Van Loan that they had redeemed said property from the foreclosure sale heretofore held in connection with the above proceeding;" and that "in accordance with said order, said Receiver Milton Johnson, did on the 29th day of September, 1936, file his final report and account for the period from March 1, 1935. to September 2, 1936, and did also turn over possession of said premises to said John S. Van Loan and Elsie M. Van Loan, by virtue of the order heretofore entered on the 1st day of September, 1936."

In her amended petition Lena Akerberg further alleged that an examination of the records in the office of the Recorder of Deeds of Cook county, as well as the files in this cause, disclosed that on July 31, 1936, the master, pursuant to the decree of foreclosure and sale theretofore entered in this cause, sold the property involved to one Ivor Jeffreys, to whom he issued a certificate of sale on the same day, which certificate was recorded august 14, 1936; that thereafter on May 4, 1938, there was issued to Ivor Jeffreys, purchaser at said sale, a master's deed, which was recorded on May 5, 1938; and that said Ivor Jeffreys became the owner of said premises by virtue of said master's deed.

The petition then alleged that no redemption of this

stated to the court that they had acquired the equity of the property herein forcelosed and subsequently did redeem such -cmaker blac to squased has was else squassors and mort viregord tion they asked the court for an order directing the Receiver, and to the second of the total accordance of the second of incomplete is moitined news bis to surthy you tell relational of facts therein contained, manely, that a recompilion had been made by said John S. Van Loan and Elsie M. Van Loan, an order was entered on the aforecald first day of September 1936 *** remising the Receiver to surrender immediate possession to said John S. Van losn and Elste M. Van Loan, and directing the said heceiver to file his finel account and report within fifteen * * * days, said order finel September 1, 1936, finding as a fact from the sworn petition of the said John S. Van Loap and Misie M. Van Loan that they had redoemed national the from the foreclosure sale heretofore held in commetten with the above proceeding; " and that "in accordance with said order, said Receiver Milton Johnson, did on the 29th day of Leptember, 1936, file his final report and secount for the period from March 1, 1935, to September 2, 1936, and did also turn over possession of said promises to said John S. Van Leen and Wisie H. Van Lean, by virtue of the order heretofore entered on the 1st day of September, 1936."

In her amended petition Lana Merberg further alleged that an examination of the records in the office of the Recorder of Deeds of Cook county, as well as the files in this cause, disclosed that on July 31, 1936, the master, pursuant to the decree of foreclosure and sale theretofore entered in this cause, sold the property involved to one Iver Jeffreys, to whom he issued a certificate of sale on the same day, which certificate was recorded Jugust 14, 1936; that there said sale, a master's deed, which was recorded on May 5, 1938; and that said Iver Jeffreys became the owner of said premises by virtue

The petition than alleged that no redemption of this

property was ever made by John S. Van Loan and Elsie M. Van Loan or by any other person or persons and "that a fraud was perpetrated upon this honorable court by the petition of John S. and Elsie M. Van Loan fraudulently representing to the court that they had redeemed said property from foreclosure sale heretofore held in the above entitled cause and that by virtue and because of said fraudulent representations to this honorable court, the order of the 1st day of September, 1936, was procured;" that "because and by virtue of the fraudulent misrepresentation that said property had been redeemed by John S. Van Loan and Elsie M. Van Loan, the Receiver, Milton Johnson was on the 29th day of September. 1936, ordered to turn over the sum of One Hundred Forty-Five (\$145.00) Dollars, to said John S. and Elsie M. Van Loan and also the court was induced to order the balance on hand as shown by the Receiver's final report and account after the deduction of Receiver's fees and attorney's fees in the sum of Three Hundred Fifteen (\$315.00) Dollars [paid] on taxes delinquent against said property, which said payments were made after foreclosure sale and contrary to law; " and that "no report and account has been filed in this cause for the period from the 2nd day of September, 1936, to the 31st day of October, 1937, the end of the statutory period of redemption as provided for in the order entered on the 10th day of August, 1936."

The petition concluded with the prayer that the order of September 1, 1936, be vacated; that the Van Loans file within ten days their account and report for moneys collected by them from September 2, 1936, to October 31, 1937, when the period of redemption expired; that the Van Loans "reimburse this estate for the benefit of your petitioner and other bondholders similarly situated in this cause, the said sum of One Hundred Forty-Five (\$145.00) Dollars, fraudulently procured from this court by order of September 1, 1936;" that the Van Loans and Ivor Jeffreys or one or either of them "be directed to turn over to this honorable court the sum of Three Hundred Fifteen (\$315.00) Dollars, which this honorable court was induced to

property was ever made by John S. Van Loan and Elsia E. Van Loan being or bernet as that a fall " ban amount or por por perpetented upon this honorable court by the petition of John S. and Maie M. Van Loan fraudulently regresenting to the court that they had redeemed said property from foreclosure sale heretefore hald in the -rhuart bias to sauged bus satir by fail has eause beliting evods isl sat to rebre and trans sideronoi aint of anotisineserger thel day of September, 1936, and produced; "that "because and by virtue of the fraudulent misrepresentation that said property had been redouged by Juliu C. The Lone and Clare C. The Lone, the Continue, Milton-Johnson was on the 19th day of Japtember, 1976, ordered to turn over the sum of One Bundred Porty-Five (5145,00) Bellars, to said John S. and Elsie M. Van Loan and also the court was induced frager Land's reviewed and yet avone as breat no someled sait rebro of and account after the deduction of Receiver's feer and atterney's fees in the sum of Huree Hundred Fifteen (#315,00) believe [weid] the singular this mids officers him realize frommitte tend no made after foreclosure and contrary to law; " and that "no mort boired and rot eause sint at belit ased and jauces has jacque the 2nd day of September, 1936, to the 31st day of Getober, 1937, ent mi, not belivery as noitemeast to boirce yrotutels out to bue ent order entered on the 10th day of August, 1936."

 pay on delinquent taxes as aforesaid, by virtue of the misrepresentation set forth in the petition of John S. Van Loan and Elsie M. Van Loan, heretofore referred to; " and that "upon the filing of such account and the turning over of all the aforesaid moneys, that this court might enter an order distributing same to the parties so entitled to same, among which is your petitioner."

Respondents filed a motion to dismiss the Akerberg amended petition, averring that it stated "no cause of action" against them, that the trial court was without jurisdiction of either the subject matter of the petition or of said respondents, and that petitioner was guilty of laches. The court having denied the motion to dismiss, respondents elected to stand upon said motion. The order from which this appeal is taken directed "that John S. Van Loan and Elsie M. Van Loan and Ivor Jeffreys, or either of them, file with this court within 10 days from the date of this order, their account and report for moneys received, collected or accrued to their benefit and disbursements made by them for the period from the 2nd day of September, 1936, the date to which the Receiver, Milton Johnson, has accounted, to the 31st day of October, 1937, the end of the statutory period of redemption."

Respondents' theory as stated in their brief is "that the court was without jurisdiction and that petitioner was guilty of gross laches;" and that "the amended petition showed no cause of action against the respondents or any of them."

Petitioner states her theory as follows: "Where all necessary steps have been taken to make possible the application of rents collected during the period of redemption, in reduction of a deficiency judgment the right to said rents being established by the trust deed and the decree, the discharge of the receiver and turning over of possession to redeeming defendants does not affect the right to have said rents applied on said deficiency. And where the order discharging the receiver and turning over possession was obtained by fraud, and without notice, so far as the record shows, the rights established by the decree remained unaffected by said order fraudulently obtained."

Was the order of September 1, 1936, removing the receiver

pay on delinquent taxes to aforesald, by virtue of the misrepresentation set forth in the petition of John S. Van Loan and Miste N. Van Loan, heretofore referred to;" and that "upon the filing of such account and the turning over of all the aforesaid moneys, that this court might enter an order distributing same to the parties so emtitled to same, among which is your petitioner."

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Was the order of September 1, 1936, removing the receiver

and directing him to turn over the foreclosed premises to the respondents John S. Van Loan and Elsie L. Van Loan procured by fraud? That fraud was perpetrated on the court to secure the entry of this order must not only be conceded but it is admitted on the record. By their motion to dismiss the amended petition of Lena Akerberg respondents admitted all the facts well pleaded therein. But they argue in effect that the fraud indulged in by them is not the kind or character of fraud that may be held to vitiate the order removing the receiver. We think that it is and that such order was void from the date of its entry.

Just what is the situation presented? Ivor Jeffreys is an attorney. He was not a party to the foreclosure proceeding. He purchased the property involved for \$5,000 at the foreclosure sale and received the master's certificate of sale. The decree of ugust 10, 1936, confirming the master's report of sale and distribution, ordered a deficiency judgment of \$33,253.98 entered in favor of the plaintiff successor-trustee. The decree also ordered that the receiver, who had been theretofore appointed and who was in possession, continue in possession of the premises until the expiration of the period of redemption and that the net income received by him from said property be applied to the payment of the deficiency judgment. The receiver continued in possession of the premises until he was ordered to turn over the possession of same to the Van Loans on September 1, 1936. This order was procured by the Van Loans by the fraudulent representation in their petition that they had redeemed the property from the foreclosure sale. Thereafter, at the expiration of the period of redemption, the master's deed was issued to Attorney Ivor Jeffreys, the purchaser at the foreclosure sale, which demonstrated conclusively that the property had not been redeemed by the Van Loans or any one else. The record discloses that Ivor Jeffreys as the attorney for the Van Loans procured the entry of the order of September 1, 1936, removing the receiver and turning the property over to the Van Loans. Upon the hearing on respondents! motion to dismiss the Akerberg amended petition,

and directing him to turn over the foreclosed premises to the respondents John 5. Van Loan and Miste I. Van Loan procured by fraud? That fraud was perpetrated on the court to secure the entry of this order must not only be conceded but it is admitted on the record. By their motion to dismiss the amended petition of Lean Merberg respondents admitted all the facts well pleaded therein. But they argue in effect that the fraud indulged in by them is not the hind or character of fraud that may be held to vitiate the order removing the receiver. We think that it is and that such order was void from the date of its entry.

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Attorney Jeffreys, who represented the Van Loans as well as himself in the trial court in the instant proceeding and is the attorney for all the respondents on this appeal, made the following statement: "Counsel has introduced a petition here on the part of the Van Loans to turn the property over to them, upon which an order was entered that the property be turned over to them and that the receiver be discharged. *** Although I did not present that petition, I sat in the back part of the room, *** I didn't present the petition but I heard it. I was in court." This statement was made despite the fact that the record shows that on the reverse side of the order of September 1, 1936, removing the receiver upon the Van Loan's petition of the same date, appears the name "Ivor Jeffreys" as solicitor for the Van Loans, This being so it is fair to assume that Attorney Jeffreys not only prepared said order but that he prepared and presented the petition upon which it was predicated. When that petition was sworn to by the Van Loans they knew that it was false since they had not redeemed the property. When Ivor Jeffreys, their attorney, prepared and presented that petition, he knew that the Van Loans had not redeemed the property from the foreclosure sale. If they had, necessarily he must have known, since he was the purchaser at the master's sale, and received the master's certificate and the money paid to redeem would have been received by him.

when the petition of the Van Loans containing the sworn false and fraudulent allegation that they had redeemed the property was presented to the court, they thereby asked the court to take jurisdiction over them and the subject matter of their petition. Had the true state of facts been presented to the court the Van Loans would have had no place in this proceeding. They induced the court by their fraudulent petition to take merely colorable jurisdiction over them. Having done so, any order secured by them was a nullity. An order, judgment or decree obtained by fraud will be set aside by a court of equity at any time. Where, as here, the motion to dismiss admits the fraud alleged in the amended petition, it is mandatory on the court to

Attorney Jeffreys, who represented the Van Loung as well as kingelf to the tale out to the anti-ecocy partent of a tipe of the for sinometain grivolled out them alongs and no sinohoogen and ile of amount had the free on the part to be part and included a proposition of the Very Lorentz of the Very L turn the property over to them, upon which an order was entered that the property be turned over to them and that the receiver be diacharged, we Although I did not precent that petilion. I set in the back I the root the part of the light I speech the part of the part of tady Jost odd edigued ones our thousands while ".trues at eaw I .th .I reductived to rebre edd to ebia eurever edd no dadd aweda broser edd 1936, removing the receiver upon the Van Loan's petition of the same date, appears the name "Ivor Jeffreys" as solicitor for the Van Loans, -ery vine for averilat venretts that enuces of rish at the pathod sinf mous noithing out hereased and hereased ad ted tobro biss borse which it was predicated. When that petition was sworn to by the Van ent bemeeber for bed yent comis eals as it fait went yent casel property. When Iver Joffreys, their attorney, prepared and prepared that potition, he knew that the Van Loans had not redecemed the property from the foreclosure sale. If they had, necessarily he must have known, since he was the purchaser at the master's sale, and received -er and even blue arrier of him, your all he displicate starfied gordina to della co

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vacate and set aside the order procured by fraud upon the court and the bondholders. In passing upon a somewhat similar situation in Reisman v. Central Mfg. Dist. Bank, 296 Ill. App. 61, this court said at pp. 66 and 67:

"It is next urged by petitioners that a judgment or decree obtained by fraud will be set aside by a court of equity at any time, and where the motion to strike admits the fraud, it is mandatory upon the court to vacate and set aside the order thus procured. The petition herein alleges facts which constitute fraud and the authorities in this state and elsewhere have consistently approved the maxim that fraud vitiates every transaction into which it enters and is applicable to judgments so procured. In Melson v. Rockwell, 14 Ill. 375, it was held that (p. 376) 'a fraudulent judgment is void in equity as it regards the party defrauded, and cannot therefore preclude the exercise of equitable jurisdiction.'

"In Elting v. First National Bank, 173 Ill. 368, it was said (p. 391): 'When a judgment has been obtained by fraud, it is a mere nullity, and it may be attacked on account of the fraud in a collateral proceeding, and equity has jurisdiction to cancel and set aside such a judgment.'

"In Moore v. Sievers, 336 III. 316, the court (p. 322) reiterated the rule as follows: 'A court of equity has always the power to grant relief against judgments and decrees obtained by fraud and this power will be exercised to prevent the enforcement of a judgment or decree which is against conscience *** (Farwell v. Great Lestern Telegraph Co., 161 III. 522; Elting v. First Rat. Bank, 173 III. 363; Atlas Nat. Bank v. More, 152 III. 528; Ling v. Little, 267 III. 20.)

"In Johnson v. Waters, 111 U. S. 640, the court gave its approval to this doctrine as follows: 'The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud *** The Court of Chancery is always open to hear complaints against it, whether committed in pals or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it.'"

It cannot be questioned that the decree of August 10, 1936, which directed the entry of the deficiency judgment, was a final determination of the right of the plaintiff successor-trustee, to have the rents and profits which accrued from the property during the entire period of redemption applied toward the payment of said deficiency judgment. This was true, even though the owners of the equity had actually redeemed the property. The order of September 1, 1936, removing the receiver and turning the possession of the premises over to the owners of the equity, did not, as respondents contend, authorize

vacate and set aside the order procured by fraud upon the court and the bondholders. In rassing upon a comeshet similar situation in Reisman v. Central Lin. Heri, Renk, 296 ill. App. 61, this court said at pp. 66 and 67:

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"It is next urged by petitioners that a judgment or decreated by frauk will be set sande by a court of equity at any time.

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It cannot be questioned that the decree of August 10, 1935, with directed the entry of the deficiency judgment, was a final destination of the first of the deficiency judgment, was a final destination of the course of the country of the country, of the country, of the country of the country, of the country of the country, of the country, of the country, of the country of the country, of the country of the country, of the country of the country of the country, of the country of the country, of the country of

the Van Loans to convert the rents and profits received from the property to their own uses and purposes, That order could not have intended any such result. In our opinion, assuming that the Van Loans had in fact redeemed the property, the only effect of the order of September 1, 1936, was to supplant the receiver by the Van Loans as the collecting agency of the rents, obligated just as the receiver was to account for said rents to the successor—trustee for the benefit of all of the bondholders.

Respondents invoke the soctrine of lackes as a bar to the relief sought by the petitioner, Lena Akerberg. This doctrine has no application where the party acts diligently and within a reasonable time after the facts upon which the fraud is predicated have been disclosed. "Nowever great the lapse of time, lackes is not imputable to a party who had no knowledge of a judgment against him and it is only required of him to be diligent in seeking relief after he has notice of it." Cummer v. Cummer, 283 Ill. App. 220. We are in accord with the finding of the trial court that the petitioner was not guilty of lackes. In any event parties who combine together, as did the respondents here, for the purpose of fraudulently procuring an order from the court, are precluded from relying on lackes in a court of equity.

(Messick v. Mohr, 292 Ill. App. 69; Greenman v. Greenman, 107 Ill. 404.)

We are impelled to hold that the trial court did not err in entering the order from which this appeal is taken; that said order directing an accounting by respondents merely enforced the rights of the bondholders as established by the decree of ugust 10, 1936; and that those rights remained unaffected by the void order of September 1, 1936, procured as it was by the respondent attorney Ivor Jeffreys upon the fraudulent sworn petition of the other respondents.

For the reasons stated herein the order of the Superior court is affirmed.

ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

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HAROLD PURNELL, doing business as PURNELL STUCCO RECOLTING CO.

elige,) APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

THOMAS JONES and ELLEN JONES,

307 LA. 385

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendants, Thomas Jones and Ellen Jones, seeks to reverse a decree entered December 15, 1938, which ordered the foreclosure of a mechanic's lien upon the complaint of plaintiff, Harold Purnell, doing business as the Furnell Stucco Recoating Co. No brief has been filed by plaintiff.

Plaintiff's unsworn complaint filed June 24, 1938, alleged that he is engaged in the business of recoating stucco buildings; that June 11, 1936, defendants "authorized, permitted and directed" Vance and Gormley to order from him the necessary labor and materials to "dash-coat" the residence and garage of defendants at 918 Belleforte avenue, Oak Park, Illinois; that subsequently he submitted a written proposition to defendants to do the work for \$175, which they orally accepted, and that they approved and accepted the work when it was completed on July 18, 1936; that when the contract was entered into July 11, 1936, when the work was being done, when it was completed on July 18, 1936, and when the complaint was filed June 24, 1938, defendants were the owners in fee simple of the premises in question; and that on January 3, 1938, plaintiff filed a claim for a mechanic's lien and that he was entitled to a decree foreclosing his lien.

Defendants' answer denied that July 11, 1936, or at any other time they applied to plaintiff or authorized or permitted or directed Vance and Gormley to apply in their behalf to plaintiff to furnish the necessary labor and material alleged in the complaint; that plaintiff ever submitted to them any proposition in writing covering said work; that on July 11, 1936, or at any other time they

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This appeal by defendants, Thomas Jones and Ellen Jones, seeks to reverse a decree entered December 15, 1938, which ordered thit is a maintain of the age of the state of the consider of the contract of Merold Furnell, doing business as the Furnell Staces Recenting Co. Wo brief has been filed by plaintiff.

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Day andants' answer denied that July 11, 1936, or at any to bettiared to bezironiue to filthisly of beiligg a it sail tello of Thinkels of Theded their ni they to apply to the et all injerill Caraina the answerry labor and actorial alleged in the court don't please the minister of the continue to a line of the covering with the total light of the court of the there orally or otherwise accepted plaintiff's proposition to do the work; that at the time said contract was alleged to have been entered into or at the time said work was alleged to have been performed they were the owners in fee simple of the premises involved; that they at any time accepted the work alleged to have been performed by plaintiff in compliance with said contract or that they promised to pay \$175 for this work; or that they acknowledged at any time that the work and material in question was furnished for them.

The answer then averred that plaintiff did request defendant Thomas Jones to pay him \$175, but that such demand was made upon him for the first time approximately one year after the work was done; that defendants refused to pay said bill; that on October 28, 1937, suit was instituted by plaintiff against defendants on this same claim before a justice of the peace in Oak Park, Illinois; and that after a full hearing on the merits in that action plaintiff took a nonsuit on November 19, 1939, because of his failure to sustain his claim.

Plaintiff testified that "he had been acquainted with Vance and Gormley for some time and had done business with them, and that in July 1936 Vance gave him an order to do the work in question on the premises in question and stated that he would pay for the work when the house was sold;" that "he did the work and that the reasonable price therefor was \$175 and that he had not been paid for it;" and that he "knew Vance was not the owner of the premises."

On cross-examination plaintiff stated "that he did not communicate in any way with Jones relative to the work until about a year after the work was completed, when he heard that the building was sold, and then by telephone asked defendant to pay and defendant refused;" that he "had never met Jones or talked with him or corresponded with him or contacted him in any way until said last mentioned time; that he made no inquiry as to Jones; that he did not investigate the title to the premises and did not know whether or not Jones was the owner of record of the premises when the work was done; that he trusted Vance and Gormley * * * that he entered the charge on his books against Vance and Gormley; that he sent

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it; and that he "know Vance was not the owner of the premises."

 repeated statements of this account to Vance & Gormley in their names *** that neither of the defendants was present at the time when he had his purported talk with Vance relative to this work."

Plaintiff introduced in evidence a certified copy of a deed to this property from Gladys J. Marx to defendants dated June 26, 1936, and recorded in the office of the Recorder of Deeds of Cook County, July 22, 1936.

William Vance, testifying in plaintiff's behalf, stated that "in 1936 he was a member of Vance & Gormley, real estate brokers;" that "he had known Thomas Jones, one of the defendants for some time;" that "he took Jones out to view the property in question and afterwards sold it to him;" that "the property needed restucco work and painting on the outside;" that Jones told him to have this work done; that he "talked with plaintiff Purnell in July 1936 and ordered the work to be done and was to be paid for when the house was sold;" that "the work was finished by plaintiff on July 18, 1936," and that "Jones bought the property for resale."

On cross-examination Vance testified that Jones told him to have the work done when he and Jones were at the building and at that time Jones had not signed the contract for the purchase of the property; that "under the contract Jones was to place a mortgage of \$5,500 on the premises; " and that he "told Jones that the FMA would not make the loan unless some restuccoing and repainting was done;" that "after Jones told him to have the work done Jones signed a contract for the purchase of the premises, which was dated May 23, 1936; that he "was not the owner of the premises but was the broker for one Marx;" that "the contract provided for a broker's commission to be paid by seller to Vance & Gormley *** in the amount fixed on the Chicago Real Estate Board's schedule of commissions: " that Jones paid him \$200 on the contract; that on August 1, 1936, Jones paid him \$100 more; that "on 'final settlement sheet' dated September 9, 1936, on premises in question, defendant Jones received check for \$643,25, brought to him by Vance as the balance of the loan of

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During the course of Vance's testimony plaintiff identified certain exhibits which defendants later introduced in evidence.
The first of these exhibits was a statement sent by plaintiff to
Vance & Gormley for \$175 covering the cost of the work in question.

Defendants' Exhibit 2 was their contract for the purchase of the
property in which the price was fixed at \$5,300, \$300 of which was
to be paid in cash and the balance by way of a loan of \$5,500.

Defendants' Exhibit 3 was the receipt given by Vance & Gormley to
Jones for the \$200 paid to Vance on the contract of purchase. This
receipt recited that such payment was deposited on the purchase price
of the premises "to be returned if contract of sale is not consummated in thirty days."

The following agreed statement as to the testimony of defendant Thomas Jones is quoted from the record: "He denied that he was the owner of the premises in question at or before the time the work in question was done; denied that he at any time had directed or authorized Vance to have the work in question done, or ever had any notice or knowledge that Vance had purported to have the work done for defendants or as their agent; denied that Vance was his agent; he intended to resell the place; he had been out to the place before he signed the contract and saw the condition of it; Vance stated that he would arrange for the mortgage with the FHA; at that time Vance told him that the FHA would require some stucco work to be done, to which Jones said nothing; that Vance told him he would have the work done but nothing was said about Jones paying for it or that it would be charged to Jones; that he knew the work was going on and saw the same; that he did not at any time inquire of Vance as to how Vance had

\$5,700 and defendant indexed same and turned it over to Vance for delivery to Marx;" that the witness "did not deliver said check to Marx but retained \$60 of this check and delivered to hars his check for \$583.50;" that he and Marx had brouble as to the anoma due the latter; and that he will have that Jones paid Marx an additional sum of \$369.47 on March 18, 1937, before he was able to obtain possession of the granices."

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procured the premises to be restucced nor as to who did the work and said that he never received any notice of any kind from the plaintiff of his intention to do the work or that he had done the work or that he was looking to Jones for payment of the work until about a year after the work was completed, when plaintiff called him on the telephone and asked him to pay, and he declined to pay. He knew that Vance expected to resell the premises upon the usual commission."

The only question raised by the pleadings and necessary to be determined from the evidence was that of agency. When Vance of Vance & Gormley, the real estate brokers, entered into the contract with plaintiff for the performance of the work involved, did he do so as the authorized agent of defendants? There is no evidence in the record that even remotely tends to show that plaintiff relied upon any relationship of agency between Vance and the defendants at the time that he entered into the contract with Vance and performed the work.

According to plaintiff's testimony Vance, whom he knew, came to him, ordered the work done and said he would pay for it when the building was sold. Vance also testified that he ordered the work done and that it was to be paid for when the building was sold. Jones's name was not mentioned by Vance to Purnell. Plaintiff testified that he did not know Jones, had never heard of him and that he never had any business dealings with him. So far as plaintiff was concerned Jones was not in existence. Having made no investigation of the title to the premises he did not know whether Jones owned the property or had any interest in it. If he had investigated the title he would have found that Jones was not the owner of record of this property when the contract was made with Vance or when the work was completed July 18. 1936. the deed to defendants not having been recorded until July 26, 1936. Purnell charged this job on his books to Vance & Gormley and to them alone and he thereafter sent out statements to them requesting payment and to them only. He stated that he

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procured the premises to be restuceded nor as to who did the work and said that he never reactived any noite; of any kind from the plaintiff of his intention to do the werk or that he had done the work or that he was looking to Jones for payment of the work until about a year after the work was completed, when plaintiff salled him on the telephone and acked him to pay, and he declined to pay. He knew that Vance expected to recell the premises upon the usual commission."

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The only evidence in the record upon which plaintiff relied to establish the fact that Vance was the agent of Jones in this transaction was the testimony of Vance that when he took Jones out to look at the property the latter told him to have "this work done." At that time Jones had not entered into the contract for the purchase of the property and, even after he had signed the contract of purchase, the consummation of the deal was contingent upon the acceptance by the then mortgagee of payment of the outstanding mortgage indebtedness in a reduced amount and the procurement by defendants of a FHA loan.

It is clear from plaintiff's own testimony that he told Mr. Vance as the agent of Vance & Gormley that he trusted Vance & Gormley, that he extended the credit to Vance & Gormley and that he looked solely to Vance & Gormley for payment. We think it was only as an afterthought and for some reason not apparent from the evidence that more than a year after the work was completed he sought to impose this obligation upon defendants. In our opinion plaintiff failed utterly to show any liability on defendants' part.

The decree in this cause, which awarded a sale of the premises in question, was entered without notice to defendants or their counsel and in their absence on December 15, 1939, and defendants' attorney had no knowledge of its entry until January 10, 1940.

On March 8, 1940, defendants presented a verified petition for leave to file a bill of review on the ground of "newly discovered evidence coupled with fraud." Said petition contained the following among other pertinent and material allegations:

"And your petitioners further represent, that since the rendition of said decree, your petitioners have discovered new matter of consequence in said cause, and particularly, that prior to the filing of the said claim for lien, the said plaintiff had executed and delivered to the Chicago Title & Trust Company a general waiver of the lien prayed for in said bill and awarded by said decree; that said waiver was addressed 'To all whom it may concern;' that a photostatic copy of waid waiver of lien is hereto

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attached, marked Exhibit A and hereby made a part hereof.

"And your petitioners state that they did not know of said waiver of lien and could not by reasonable diligence have known of it, so as to make use thereof in the said cause, previous to and at the time of the pronouncing of said decree. That your petitioners had never heard of the plaintiff herein at any time until one year after the work was completed, when plaintiff demanded payment of them; that several months thereafter, plaintiff sued petitioners and after hearing, took a nonsuit. That thereafter, on January 3, 1938, plaintiff filed his claim for lien in the office of the Clerk of the Circuit Court of Cook County, but that no notice thereof came to petitioners until, to-wit, the 25th day of January, 1938, by opinion of the Chicago Title & Trust Company. That thereupon defendants served a thirty day demand pursuant to statute, on plaintiff to file his bill herein; that prior to said Chicago Title & Trust Company opinion, petitioners had never had any notice of any claim for lien by plaintiff.

"That petitioners were informed on, to-wit, March 1st, 1940, by their attorney, that he had discovered that a waiver of said lien had been executed and delivered by plaintiff to the Chicago Title & Trust Company. And your petitioners are advised that the said new matter is conclusive in nature and effect upon the rights of the plaintiff herein."

Exhibit "A" referred to in the petition is as follows:

"July 29, 1936.

"TO ALL WHOM IT MAY CONCERN:

"Whereas, we the undersigned, Purnell Stucco Recoating Co., have been employed by Thomas Jones to furnish labor and material for stucco work for the building known as 918 Belleforte Ave., Oak Park, Ill.

"NOW, THEREFORE, KNOW YE, That we the undersigned for and in consideration of one Hundred and Seventy-five and no/100 Dollars, and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby waive and release any and all lien, or claim or right to lien on said above described building and premises under the Statutes of the State of Illinois relating to Mechanics' Liens, on account of labor or materials, or both, furnished or which may be furnished by the undersigned to or on account of the said ______ for said building or premises.

A. D. 1936. "Given under hand and seal this 29th day of July

"PURNELL STUCCO RECOATING CO. (Seal)
"H. D. Purnell (owner)

"Exhibit 'A'."

The trial court peremptorily denied defendants' petition for leave to file the bill of review. We think that the court erred in so doing. Since the defendants were not guilty of laches under the facts alleged in their petition, they should have been allowed to file their bill of review. The waiver of lien, which was set forth in and made a part of the petition and the bill of

attached, marked Exhibit A and hereby made a part hereof.

"And your petitioners state that they tid met know of the second time of the pronouncin; of said decree. That your will on the control of the

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review, was executed under seal and delivered by plaintiff to the Chicago Fitle & Trust Company on July 29, 1936. This new evidence was conclusive and constituted a complete defense to plaintiff's claim. The waiver was general and ran "To all whom it may concern." It contained no conditions or limitations. It expressly described the lien involved here and expressly waived it. It named the parties and specifically described the premises in question. It was under seal and acknowledged payment in full of the specific sum claimed in this case. This waiver furnished an absolute defense to any claim plaintiff might have had against the defendants or anyone else by reason of the performance of the work upon which the instant claim is based. Although the trial court erred in refusing to grant defendants' petition for leave to file their bill of review, it would serve no useful purpose to remand the cause on that account.

For the reasons stated herein the decree of the Circuit court is reversed and plaintiff's complaint is dismissed for want of equity.

DECREE REVERSED. PLAINTIFF'S COMPLAINT DISMISSED FOR WANT OF EQUITY.

Friend, P. J., and Scanlan, J., concur.

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Friend, P. J., and Coanlan, J., concur,

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1940.

Term No. 1

Agenda No. 1.

JAMES MACHAC and MARY MACHAC.

Appellees

VS.

EAST ST. LOUIS & INTERURBAN WATER COMPANY,

Appellant.

Appeal from the Circuit Court of St. Clair County.

307 I.A. 540

Dady, J.

Plaintiffs recovered a judgment for \$476.00 and costs on a verdict of a jury in a tort action against defendant, from which judgment defendant appeals.

Plaintiffs owned a brick house and lot in East St. Louis, abutting on a public alley. In March 1938, defendant installed a water main in and along this alley, and in so doing dug a trench about twenty-four inches wide and about five feet deep. The inner edge of such trench was about six and a half feet from the nearest wall of such house.

The complaint charged that in digging such trench the defendant carelessly, negligently and improperly used and operated heavy power machinery so close to such house that the operation and vibration of such machinery caused the house to vibrate and the walls and ceilings thereof to be cracked and that the reasonable cost of repairs was \$3,000.

By its answer the defendant acknowledged digging the trench, but denied any negligence, denied causing any injuries and denied that the reasonable cost of the repairs was \$3,000.

The first contention of the defendant is that the plaintiffs did not prove by the greater weight of the evidence that the defendant was negligent, and that the "overwhelming preponderance of the evidence is in favor of the defendant on the question of any damages to this building by the



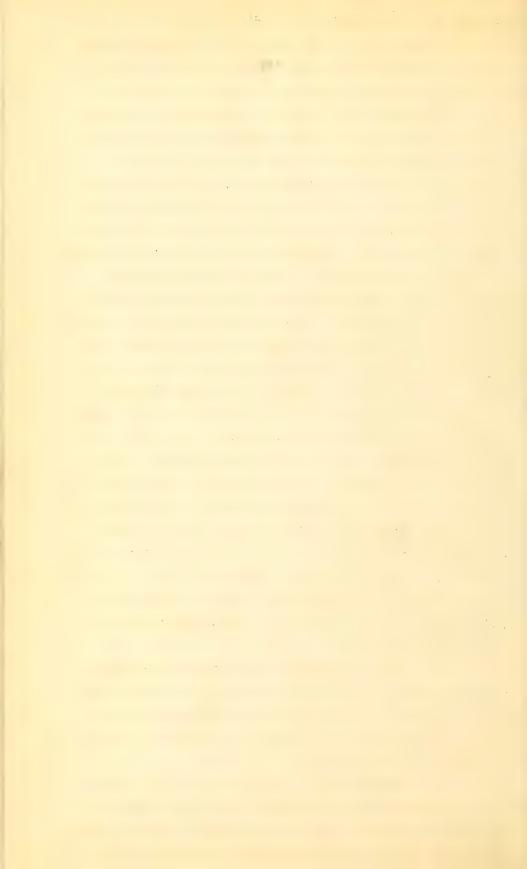
operation of this machine."

The trench was dug by means of a ditching machine run by a gas engine. One witness for the plaintiff testified that when the machine was working at the place in question it ran into some buried railroad ties and "the ground was shaking just like an earthquake"; another witness who lived across the alley testified that when it struck such ties it "shook the (his) house," that he ran outside and saw the machine stop working and then start again and "it just shook everything around there": another witness testified that at the time the machine struck such ties he was standing about five feet from the machine and "when it hit the ties it jarred the ground all around"; another that when such machine hit the ties there was "plenty of vibration"; another that "when the scoops would hit the ties the machine shook and shook the ground" and he felt the "shake" when he was about twenty feet from the machine; another that "when the machine pulled the ties out the ground would shake all around." The plaintiffs and a sister of one of the plaintiffs testified that at the time in question they were in the house and felt the house shake and the dishes rattle. Ten employees of the defendant testified that at different times they were in some way connected with the work in question; that there was no vibration at all and no railroad or other ties where the ditch was dug.

Several witnesses testified that before the ditch was dug the walls and ceiling of the house were intact, but were cracked after such digging, the cracks appearing within three or four days.

Defendant contends that it appears from certain photographs "there are no cracks on the wall of that building."
We have examined the photographs and do not find them at all helpful in passing from the question of whether or not there were cracks in or on the walls.

The truth of all this testimony was, of course, a question for the jury and we cannot say that the verdict is manifestly against the weight of the evidence. There was ample evidence to justify the jury in finding the defendant was



negligent, and that the house of plaintiff was injured through such negligence.

The next contention of defendant is that the court erred in the following rulings:

- "Q. Would you say that any of these cracks in this house were caused by natural settling after twenty some odd years?
- "MR. FARMER: I object. That would be a conclusion of the witness and invades the province of the jury.

"The Court: Objection overruled.

To which ruling of the Court counsel for the defendant then and there excepted.

- "Q. Would you say that these cracks were caused by natural settling?
- "A. No. I don't think so because the house was there so many years and it was all right.
- "Mr. Farmer: I move to exclude that answer as incompetent and improper and being a conclusion and invading the province of the jury.

"The Court: Motion denied."

The brief of plaintiffs does not give the name of the witness being examined, and does not refer to any page of the abstract or record, as should be done.

It will be noted that although the court overruled the objection to the first question, there was no answer, so there was no harm in the ruling.

There was no objection to the second question. If the question was objectionable, objection should have been made before the witness replied. In our opinion the motion to exclude the answer should have been allowed, as the question as to what caused the cracks was an ultimate fact to be passed upon by the jury. However, considering the whole record, we do not consider this sufficient to justify a reversal. (See Schneider v. Manning, 121 Ill. 376, 386, which is one of the cases cited by defendant.)

The next and last complaint of defendant is that the court erroneously permitted plaintiffs to prove the damages by showing the cost of repairs, and erred in giving the jury an



instruction that the measure of damages was the reasonable cost of the repairs. Only one witness testified on the subject of damages, and his figure was the same as the amount of the verdict. Defendant contends that the measure of damages is the difference in value, if any, of the property before and after the injury. Defendant cites Peck v. Chicago Rys. Co., 270 Ill. 34 and many similar cases in support of his contention. We do not consider any of these cases in point on the facts. Each of such cases was a condomnation case, or a case relating to some public improvement, and in no one of such cases does it appear that there was any charge of or proof tending to show negligence as in the case at bar. In the Peck case it was said "The declaration makes no charge of negligence or complaint as to the manner in which the improvement was made ***. The action of the city was not wrongful or illegal. There is no complaint of want of skill or unreasonable delay in the performance of the work." We believe under the pleadings and facts in the case at bar the measure of damages was the reasonable cost of the repairs necessary to restore the property. (McDonell vs. Ry. Co., 208 Ill. App. 442.)

The court did not err in the admission of evidence or in giving such instruction.

AFFIRMED.

OCT 28 1940

David 8. Mallett

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



41228

JOSEPH SLUVE, TERES III

and CHRISTING HARCH.

V. SUPERIOR COURT,

VICTOR B. MURSECKE, of al.,

Livelines. 307 I.A. 540

MR. PARSIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

relaintiffs, the holders of certificates of beneficial intermet is a trust, brought suit against the trustee and trust managers to enjoin the sale of the trust property and for the removal of the trust managers. Defendants' motion to strike the complaint was sustained, the suit dismissed for anot of equity and plaintiffs appeal.

The allegations of the complaint, as amended, are that is 1918 a lien of a trust deed, securing an indebtedness of 1770,000, was foreclosed and the property sold under the decree to a bencholders' committee; that afterward there was a plan for recognisation pursuant to which the horsandy Hall suilding Liquidation Trust was created and the american National mank a Trust Company named as liquidation trustee. Certificates of beneficial interest were issued to the former bondholders, plaintiffs below the owners of 1700 units of a total of 375,300 units.

The trust agreement provided that the trustee should act upon the direction of the three trust eanagers who were made defendants and who had the ectual management and control of the property; that they might direct the trustee to dispose of the property provided that not less than 50 days' notice be given to the holders of the beneficial units. The surgement further provided that the property could not be sold if the holders of more than 35% of the units abjected to the proposed sale.

It was further alleged that Charles W. Albers, as receiver for the Bain banks, was the owner of more than 35% of the units; that defendant, A. A. Bullar, was an enlayer of the water builton she had

807 I.A. 540

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upon the direction of the three trust sonapers who were more defendants and she had the property;

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that they might direct the trustee to dispose of the property provided that the holders of the filet met less then no days notice be given to the holders of the sind units. The appearant further provided that the proposed cale.

It was further alleged that theries o. Albers, as respings

supervision of the liquidation of the main banks which were then in process of liquidation; that shout June 00, 1939, Margaret sorrissay offered 100,000 for the property, and upon information and belief it one alleged that one was noting as nomines "on behalf of certain persons whose names are unknown to the plaintiff. That the trust managers agreed to do everything in their power to consummate the sale "at a price of 100,000 even though they had previous to that time received other offers for the property ranging from 110,000 to 120,000," which offers had never been submitted to the owners of the units although "the Trust Managers full well knew that if the property were offered freely for sale among brokers and persons interested in protectly of such type, offers of more than 100,000 therefor could have been readily procured. " That the trust managers, about the time they received the offer from Margaret Marrianay, miraciad the trustee to notify the holders of the units of the proposed cale; that weller recommended to Albers, the receiver, that the proposed sale be ascapted and that Albers should not file any objection to it; that plaintiffs, as owners of units, sers notified of the proposed sale and being diseatisfied "sought out other purchasers" and procured an offer from Lucilla h. solff to purchase the property for 100,000 cash. which offer was submitted to the trustees; that thereupon weller filed with the trustee, objection to the proposed sale to Margaret Apprises, signed by Albers, the receiver, as owner of more than Abi of the sutstanding units and as a result the sale to Margaret Forrissey was abandoned and notice of the proposed sale to Lucille N. wolff for \$108,000 was sent by the trustee, at the direction of the trust managers, to the holders of the units, but that such submission was "a mere shan in that the Trust Managers already has that . . . Mueller had induced Charles W. Albers to discent from said last mentioned sale and in that said 4. A. Mueller did induce Charles . Albers as seceiver to file a written discent from the propound sale at 108,000 even though they had been willing and it was their in-

pi post en e robe e mir a sia la la la latificata de la molalvacana property is a state of the court of the state of the stat of the file of the party of the party of the contract of the sale and mindray to Timber on minimum to middle our air dadd Bourfle age also oil simmer. On at the all of an all the we at at bearing the at and wall of applying her qual of most nowe Directly is coming a deended with a first or the green and market the contract of the 1250,000, " side offers bed never is an equality to the secret 2 the grouping on the bull and the lies his ear and reed out disease edine wite offered freely for and among medices and persons identicated in property of made type, effore at more than 10 and the court of bare been recilly procured. " The time tract accepts, Lock the Cine they recalved the affer from targares tarriancy, threshed the frances valled that take a core has the billed and to scalled and tilled ad necessarily at him property of that the property at halfstoness tads (si or orthogon can will son bloods avedia sads and before of me some process of the Anthibe are a value for the open of the International no bearing has been a new sould for definer beinglineed with an atter that beat well as a relative of the contact and the contact and the unifor management fact (consequent and of hossimise can notic dealer filed with the freedom, objection to the promoned rule to darkers Marriace, signed by dibert, the receiver, as every of very time Jill. foregree of after ode flacer a of but of ine gatherished out to ... willer of other housevery out to asides been beenched one resulted all for the contract of the transmit of the transmit of the brush membrours, to the helders of the entits, rut time , well nature to in fact check the time the transpare contract that the man area of all that his art? Treats at cratic of malrood bandar had called and in that enid a. a. Fyeller the continue in all a server all out the a distant from the property and -el tind to it is the calling seed but yet

tention to sell the property at a lesser price to derguest corressy," and that the sale to Lucille ". selff was thereupon abandomed.

That shortly thereafter, the trust manuer submitted to the trustee another offer by Wargaret Worrissey to purchase the property for 108,000 and directed the trustee to enter 18to an agreement to cell jurguent to the offer and caused the trustee to notify the holders of units of the proposed sale "that such new offer was submitted and such agreement was made in spite of the fact that no further effort had been made by the Trustees to secure competitive bidding from Lucille M. selff or from any other person: " that "the Trust Managere are still acting pursuant to a secret agreement with the persons for whom Maryaret Morrissey is acting as nowines, to deliver the property to such persons at the cheapest price possible" and that dueller induced Albers, receiver, not to file any objection to the proposed sale for 100,000. That the plaintiffe could procure offers for said precises at a price in excess of \$108,000 each, but that it sould be idle for them to procure and submit any further offer because the Trust Wanagers have secretly agreed with the principals of Margaret Morrissey not to sell the property at all unless it is sold to such principals; and that as a matter of fact the fair cash market value of the property is not less than \$135,000."

The allegations of the amended compleint charge defendance with freud in the proposed sale of the property. In <u>mastell</u> v. Art <u>Institute of Chicago</u>, 304 Ill. App. 393, in passing on the sufficiency of allegations where the charge made was similar to the charge in the instant case, we said: "In 10 %. G. L. p. 415, in discussing the sufficiency of the allegations of fraud it is said: 'An exceptionally high degree of certainty in the allegations of the bill is required in those cases where the cause of action is based on fraun'; that general averments of fraud are wholly inadequate. 'In making allegations of fraud, good pleading requires that the plaintiff should state specifically the inculpatory facts in order that they may carry their own

teation to call the property at a leaser prime to he, and concising!" and that the sale to becilie . Wiff we thereupon manifest.

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 conviction of fraud and in order that the wrong-soing say thereby be made more clearly to appear.' In <u>Dickinson</u> v. <u>Dickinson</u>, 305 Ill. SEL, the court said: 'a general ellegation of fraud, however strong in expression, is insufficient. The bill should point out and state the particular facts and circumstances relied on as constituting the fraud.' So general rule can be laid down as to when it is sufficient to plead an ultimate fact and what allegations are sufficiently specific, but the facts in each case must be considered."

In the instant case we think the allegations are clearly insufficient. It is alleged that when Hargaret Morrissey offered to purchase the property for \$100,000 and the beneficial owners were notified that an offer of \$105,000 had been made by Lucilia A. Wolff, albers, the receiver, who owned more than \$350 of the unite filed objections to the proposed male and it was abandoned, and the beneficial owners were then notified of the wolff offer. Objections were filed to this sale and it was abandoned because Margaret Morrissey had offered \$108,000 and the beneficial owners of the units were notified of this fact, all clearly showing that the trustee and the managers were trying to get the best offer they could for the property. The allegations of the complaint, that offers had been made for the property from other persons, ranging from \$110,000 to \$120,000, are entirely too general and insufficient.

Woreover, it is clear that if plaintiffs had called to the attention of the court that anyone would offer more than \$100,000 for the property, the sale would not be consummated. But there is no allegation that plaintiffs did anything in this respect.

The degree of the Superior court of Cool county is affirmed.

DEGREE AFFIRMED.

Matchett, J., and McBurely, J., concur.

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41257

ROMAN KOPPERT

ARRAL PROM

CIRCUIT COUNT.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

307 I.A. 541

MR. PRESIDENCE JUNTICE O'CORNOR DELIVERED THE OPENIOW OF THE COURT.

laintiff brought an action to recover damages for personal injuries elaimed to have been sustained while he was driving his automobile west on east 95th street, in Chicago. The automobile ran into a hole in the street, as a result of which plaintiff was injured. There was a jury trial, a verdiet and judgment is plaintiff's favor for \$7500 and defendant, City of Chicago, appeals.

The only point made by defendant in this court is that With street, at the place in question "was part of the system of State highways, and was maintained by the Otate of Illinois; that the city oved no duty to maintain" the street and therefore was not liable. The law is clear that where a street is a city is taken over as a part of the bighway system of the state, the city is not liable for failure to keep the etreet in repair. Tapacott v. City of Chicago, 201 Ill. App. 322; Live Stock Sational Bank v. Biehardson, 303 Ill. App. 445. In the instant case there is no contention to the contrary but plaintiff contends there is no evidence in the record that USth street, at the time and place of the accident, was a Federal Lid houte and taken ever by the state. The evidence shows that Obth street was a well traveled, busy street in Chicago, with street lights, signs, water sains, street cars and the sustomary red and green stop lights near the place of the accident. "This was prize facir evidence that it was a city street." Tapacett v. City of Chicago, 301 Th. - pp. 502.

time of the seeldest, June 1, 1037, had been taken over as a part of the state system of highways, offered in evidence two documents, such Annual or an explanation of the property of the party of

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Jeferdonk, to maintain its centention that the erroes , t the fibe accident, dunc 1, 1887, had been taken over as a part of the effect of the effects in evidence the documents, each

dated December 18, 1936. One is addressed to sayor solly of chimago, and signed by Lynet Lieberson, "Chief History Indianer, whis up t. of Highways, " in which it is said that on December 1, 1931, a new was sent to Colonel progue, Commissioner of Jubite orks of Chicago, showing extensions of "State Bond Issue Coutse" in the City of Chicago and that "There have been a number of changes and additions to the State and Issue and 'ederal Ald houtes since that time, Decisions are being sent you, with this letter, showing the present locations of all State bond Issue and Federal Aid Koutes in the City of Chicago. These decisions superseds the information contained on the map accompanying the letter of Leceaber 1, 1931." The other is a document which purports to be signed by "F. L. Buith, Director" on what curports to be a letter-head of the "legartment of Fublic Jorks and Buildings - Division of Highways - Dringfield, Illinois and is ar follows: "Federal Aid Route No. 120 In the City of Chicago - The Department of Public orks and Julidings assounces that the following described location is now the location of Pederal Aid Noute No. 100 in the City of Chicago. - Description of Route.

"Beginning at the west limits of the City of Chicago on 95th Street and extending in an easterly direction along 95th Street to the intersection with South Chicago Avenue."

Open objection to the admission of these documents by source for plaintiff, the court announced that the objection would be denied "until such time as it may be connected up," - that defendant produce more evidence to show that the street had been taken over by the state. Fo further evidence having been produced by the city, the locuments were excluded.

Counsel for defendant say: "The legislature has placed the exclusive control and jurisdiction over Federal Ald Moutes in the Atate," and refer to pars. 292, 297 and 298, thep. 121, 711. Bay. Stats. 1929.

Far. AD2 provides: "The system of this highways shall now-

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Counsel Tar defendant tip: "The definitation was the counse in the last statement in the

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prise the following roads: """

- *(4) All highways constructed, or authorized to be constructed, by the late and federal overments, and known as 'federal Aid Roads;' ***
- Par. 297 provides: "when roads are to be taken over by

"Rec. 7. The highways designated in this Act as "tate highways shall be taken over from the several *** cities, *** by the Department of Fublic works and Buildings, as provided in said Acts, and those parts of said State highways on which no durable hard-surfaced improvements have been started or completed under the provisions of the Acts designated in this Act may be taken over by the Department of Fublic Works and Buildings is its discretion, as rapidly as the appropriations made for repairs, improvement and maintenance thereof permit, , rovided the Department shall first take over the State Lond Issue Roads. Defore any highway, or part thereof, on which no durable hard-surfaced improvements have been started or completed under the provisions of the Acts designated in this Act, forming a portion of the State highway system, is taken over the Department of Sublic orks and Buildings shall notify in writing the commissioner of highways of the town or road district, the County Superintendent of Highways, or the mayor of the city, or president of the village, as the case may be, of its intention so to do, and of the date when it will assume the saintenance and care thereof. Thenever any part or portion of any highway which is a part of the State highway system and lies and is situated within the limits of any city, and is taken over, the epartment of Jubic works and suildings shall have exclusive jurisdiction and control over only that part of such highway which the state has constructed or which the local authority has constructed and which has been taken over by the State, and for the maintenance of which the State is responsible. "

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-diti offi en for all for the best of the state of the file ways shall be taken over from the several "" after, "" by ten inis at Sublic cris and Sublice . or rowing in this case, as ton Prince by a sideral on doing no equally a part him to array made is adulative, all cashe notal med us barante mand avail atmansver mi to the orange out of very party of year too old hi belangiable trad out with the terms and indicate at the single terms are a recommendation of the same of the sa propriations and s for regular, larger than an alabam are that as have been any case addy tweet Libes to ordered not dedicate, , throne Takun Maada, Parora any hinawar, as mort thowarf, on water as appeals and andno bessizate we begrate ased even assessorial becarrie-band provisions of the soft definated at the sering a certifical at That highest apries, is belien over the legarisons of while order and and the special to the sension and the sension of the sension of the town or read district, the County has pintendent of hisheave, or the to any on the bity, or president of the village, as the case may be, of enium en a compant ific di menio estab enis le bas, est est en noisueval avi mer and tern thereof, "denover any rark or portion of the bight way which is a park of the State biginer eretes and line and is altuated within the limits of any oldy, and is taken over, the regardaneifoldeing eviculeus aved Ilmia comblinh due paper oliful le Snee and esada sed daire granged down to trangent the term of the last sed delds has becommence and principa and able to become has the the the the state, and for the calaternage of malain the ", all the second of aftern

And par. 250 provides: "then a part or portion of the highway shall have been taken over it shall thereafter be constructed, re-constructed, repaired, improved and maintained by the state in accordance with the provisions of this Act."

that 95th street had been taken over by the state were entirely insufficient to show a compliance with the statute. And this too,
even if we assume the documents were original and not carbon copies,
as counsel for plaintiff contends, there is nothing in either of thes
which shows the state intended to take over 95th street, nor is any
time mentioned when the state "will assume the maintenance and care"
of the street as required by par. 297. Live Stock Nat. Sank v.
Richardson, 303 Ill. App. 445.

The judgment of the Direct Court of Cook County is affired.

JUDGMENT AFFIRED.

Matchett, J., and McSurely, J., concur.

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41291

FULTON E. BURKE,

Appeales,

V.

MARKET LIL OVER,

Appellant.

APPEAL FROM

CIRCUIT COUNT,

COUR COUNTY.

307 I.A. 541

MR. PRESIDING JUNIESE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Rovember 23, 1938, plaintiff filed his verified complaint against his wife, the defendant, praying that a writ of injunction issue against defendant enjoining her from taking the four year old con of the parties "out of the State of Illinois and out of the jurisdiction of the Courts of Jook Scunty, Illinois without first obtaining permission of the court so to do. On the same day the court entered an exparts order as prayed for, a summons issued and was served on defendant. December 12 following, defendant by her counsel entered her appearance and on December 19, filed her verified answer to the complaint.

The material allegations of the complaint, so far as it is necessary to state them here, are that the parties were husband and wife living in Cook county, Illinois, and had been living there nearly all their lives; that a son was born to them who was four years old March 19, 1936; that plaintiff had conducted hisself properly toward his wife but that she indicated she wished a divorce from his; that for the past sixty days defendent had been in California with her relatives and when plaintiff refused to send the child to defendent in California, she returned to Illinois for the sole purpose of taking the child out of the jurisdiction of Illinois and threatened to establish her residence in California or Sevada where she would get a divorce without legal residence, her recidence being in Illinois, and on grounds not recognized in Illinois; that if she took the child to California or Sevada as she threatened to do, she would there seek the custody of the child free courts of those states; that if plain-

07 I.A. 541

PARTIES AND ASSESSED TO ADDRESS OF THE ASSESSED TO

Hereno Ageinst his wife, the defendant, praying that a writ of injustion ageinst his wife, the defendant, praying that a writ of injustion less a ageinst defendant enjoining her from taking the four year old non of the parties fout of the state of Ullingia and out of the justicalistics of the Courts of Sounty, Illinois' without first ottaining persiesion of the court so to the in. On the error day the nourt entered an an parte order as prayed for, a summer is the court on defendant. December 18 following, defendent by her coursel cottaged her appearance and on Beognature. Seconder 18 following, defendent by her coursel cottaged her appearance and on Beognature is, filed her verified an an explaints.

The material allegations of the complaint, so far as it is necessary to state them here, are that the jurties were harband and their lives; that a son was born to them who was four paure old darch 19, 1858; that plaintiff had conducted himself properly toward his wife but that the indicated she signed a divorce from him that for the past cirty days defendent had meen in Dalifornia with her relatives and when clainviff refused to send the cuild so defendent in California, she returned to Illinois for the soil purpose of taking the child out of the jurisdiction of Illinois and threatened to establish her residence in dalifornia or Movada where the sould get a divorce without legal residence, her residence being in Illinois; that if she took the cuild and on grounds not recognized in Illinois; that if she took the cuild and on grounds not recognized in Illinois; that if she took the cuild and on grounds not recognized in Illinois; that if she took there seek and on California or Nevada as she threatened to do, she would there seek

tiff brought suit in California or Sevada he, on account of financial circumstances, would be unable to go there to protect his rights; that he had no adequate remedy except in a court of equity; that plaintiff had offered to permit defendant to take the child to California for a visit if she would agree to return him to Cock county, which she refused to do.

resident of Illinois; denied plaintiff had conducted himself properly toward her but on the contrary he "by his conduct created as incompatible relationship" which resulted in their separation. She admits she had been visiting in California for about sixty days and had returned to Illinois for the purpose of taking the child to California because plaintiff had failed to send the child to her as he had promised; that the child had been ill and she wanted to have him under her care in the climate of California which would be beneficial to him. She denied she had threatened to establish her residence outside of Illinois and obtain a divorce from plaintiff; that the parties on numerous occasions had agreed that in case of a permanent separation they would divide the custody of the child between them, and that she would be staying in California with her mother at the latter's home.

Nothing further appears to have been done in the case for nearly a year until Mcvember 9, 1939, when an order was entered by agreement of both parties that the injunction order be modified so that plaintiff should have custody of the child until December 15, 1938, with the privilege of defendant scaling and visiting the child at reasonable times, and that December 18, 1938, the custody of the shild would be given to defendant and she sight take the child to California and return him to River Forest, Illinois, where the parties lived May 1, 1939, and that plaintiff should have the custody of the child from that time until Teptember 1, 1930; that plaintiff should pay defendant 445 per month for the support of the child semi-monthly while the child was in California.

tiff brought suit in California or torais is, or account of Elasmoial circumstances, would be unable to go there to protect his righte; that is but no edequate resemble execut in a wourt of equity; that plaintiff had effected to permit definition to take the calls to failiberals for a visit if the would agree to return him to that county, which she re-fund to do.

Terestant of illisois; desired plaintity had conducted historic property revident of illisois; desired plaintity had conducted historic property for the formed ber but on the control of the control of the conduct created an incompatible of the relationship which resulted in their concretion. In admite the had been visiting in California for about sixty days and had returned to Illinois for the purpose of taking the oblid to talifornia because plaintiff had railed to send the oblid to talifornia because the child had been ill and also easied to have him under her care in the climate of California which would be beneficial to him. The cented che tain a divorce from plaintiff; that the parties on augment and do had agreed that in case of a parameter separation they would be staying the outside of the thir iner mether at the latter he would be staying in California with her mether at the latter he would be staying in California with her mether at the latter he would be staying in California with her mether at the latter he would be staying in California with her mether at the latter he would be staying in California with her mether at the latter he would be staying in California with her mether at the latter he would and come.

nosely a year until Sevender S, 1715, when an order was entered by agreement of both parties that the injunction order be modified so that maintiff should have contedy of the child antil December 15, 1978, which the privilege of defendant scalar and viciting the child at reasonable times, and that locember 15, 1836, the custody of the child nould be given to defendant and cha might take the child to California and column him to diver Jerest, Illiania, amore the graties lived hay 1, 1973, and that plaintiff should have the custody of the calld from that the until Teptember 1, 1970; that plaintiff should pay defendant that the until Teptember 1, 1970; that plaintiff should pay defendant can manth for the support of the child semi-monthly while the

December 22, 1030, plaintiff, upon notice to defendant's counsel, filed his verified petition in which he set up the issuance and of the injunction the modification of the order, as above stated; that the child had been taken to Los Angeles by defendant pursuant to the modified order; that defendant had refused to permit the child to be returned to plaintiff in accordance with the agreement between the parties, and the prayer was that a rule be entered requiring her to thow cause why she should not be punished for contempt of court for failing to comply with the modified order.

On the same day an order was entered which recites the filing of the verified petition by plaintiff, and it was ordered that defendant show cause by January 2, 1940, why she should not be punished for contempt of court for failure to comply with the modified order. December 28, 1939, defendant's counsel filed a verified getition in which he set up that on December 21, when the order requiring defendant to show cause was entered, he was out of the city and sought to have the matter continued through the efforts of another attorney; that defendant was not reciding in Los Angeles with her nother; that defendant had a good defense to the petition and wished to answer it, and the trayer was that the court enter an order extending the time for defendant to show cause to January 30. 1940. Peccaber 28, an order was entered substituting counsel for defendant. January 8, 1940, an order was entered which recites the rule entered against defendant came on to be heard; that a certified copy of the rule had been served on defendant; that defendant was not present in person but had filed her answer which the court held insufficient, and it was ordered that a writ of attachment for contempt losue forthwith against defendant for her refusal to comply with the order "touching the custody" of the child. The next day defendant filed her verified petition to modify the order entered secenter 18, 1036; that since the entry of the injunctional order plaintiff had instituted a suit for divorce in the .u. rior court of tech county in which he crayed

coursel, riled his verified jestifies in witen he set un the lessesses and in is insulated and the injunction fine continuation of the injunction fine continuation of the injunction for continuation that the child had been taken to be a continued to be referred to plaintiff in accordance with the appropriate between the parties, and the proper was that a rule be entered requiring has to show ocuse why the check of parties of parties of court for should not be partied for sonten to a court for taking the court for should not be partied for sonten to a court for taking the court for sonten to a court for taking the court for sonten to a court for taking the court for sonten to a court for taking the court for sonten to a court for taking the court for sonten to a court for taking the court for sonten to a court for the court for the court for an all the court for the court

in the came day an order was entered willow reviews the filling of the weeking the plantant, one of one without the second the con-Learnion, ad two Rimons and the Coll is decomed in each serve the for contengs of court forfullars to comply with the actified orders. becomes in 1825, defendant's somest files a ventiled religion to - ob he set up thet as leasurer II, when the order requiring foreign of ligura was the city of our of the city and amugic to the matter continued through the effecte of another atterney; tail traditor and differential to be included and tradition for the tradition and definition had a good befores he the goldston and alched he sames by and the reayer was that the court ester as order extending the time Desember PA, an for defendant to show some be desury 20. 1960. of grammic introducted to leave publicatives secretar new makes 1940, as order one entered which regites vice rule entered excises dofeeders came on to be breat that a constitled copy of the rule had been served on defendant; that defendant was not present in person but had filled her seemer which the court held insufficient, and it was ordered that a writ of attachment for cratcage trans fortheigh arcinet and introduct, department on although at the state and and temperature ountedly of the child. The next day defendant filed her verified peristant, he switte the network account to part of the little and the cases time a maderity of the third thing the cold decirate and a street and

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for the custody of the child; that shortly after the filing of plaintiff's suit for divorce in Cook county, she filed a suit for divorce in California against him; that she was willing to agree that the custody of the child might be divided between them and project that the original injunctional order be modified so as to promote the best interest of the child.

January 9, 1940, defendant filed her verified answer to the petition for contempt in which she set up in considerable detail the difficulties which arose between the parties and the correspondence between her counsel in California and plaintiff's counsel in Chicago. This answer is sworn to by defendant December 29, 1939, and apparently is the answer which the court found insufficient as shown by the order entered January 8, 1940. It is from the order of January 8, 1940, that defendant appeals.

Defendant contends that "A court of equity has Jurisdiction to adjudicate between husband and wife as to the custody of their minor child, while the parties maintain their marital status;" that in the instant case the court was wholly without jurisdiction, and reliance is placed on Thomas v. Thomas, 250 Ill. 354. In that case it was held that equity had no jurisdiction to decree the custody and control of the children of the parties except as an incident to a divorce suit. The court there held that neither a want of harmony between husband and wife relating to the management of their children, nor the right of either to their custody, control, support or education involved any equitable question of an equitable as ture such as authorizes a court of equity to decree the care and custody of children, as between their parents, except as provided by the divorce suit in case a divorce were granted.

Counsel for plaintiff contends the rule announced to the https://example.com/fhomas case is not controlling because in the instant case he is not seeking the ease is not controlling because in the instant case he is not seeking the custody of the son but only that the domicile of the child

for the custody of the child; that chartly effer the filling of plates the fur filling of plates the tiff's suit for diverse in Jelffer suit for diverse in Jelffersta equation his plates the child said that the child said the divided because the end place that the critical injunctional order he said income as as as as present and the child.

Jamery 3, 1ded, defendent filed has verified an may to the petition for contempt to which she see in the contidential that difficulties which areas between the pertine and the contemporaless this scarse to seem to by defendent desember 15, 1415, and agraphyly is the enterer mitte the court found insertialists answer which the court found insertialists and answery 8, 1940, It is from the order of January 8, 1940, it is from the order of January 8, 1940, that the the defendant appeals.

to adjudients between bushand and wife on to the runtedy of their minor child, while the perties maintain tests sarried evenus; that an the instant case the court was whelly nithest jurisdiction, and in the instant case the court of and reliance is placed on Thomas v. Thomas, who hit. Set. is that that the all test held that equity had no jurisdiction to decree the courtedy and of the children of the partice except as an incident to a between humbend and wife relating to the management of their children, nor the right of either to their energy, control, support or action to equity to decree the case and success of as authorises a court of equity to decree the case and success of all the case its case the case its successive to between their parents, succept as provided by the divorce cutt in case its case.

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remain is Illinois. We are unable to agree with this contention.

Several of the orders specifically provided for the custody of the child and we think the cause cannot be distinguished from the Thomas case.

of the suit and the court had no jurisdiction of the subject matter of the suit and the order appealed from to reversed.

ORDER REVERSED.

Matchett, J., and McSurely, J., concur.

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PARAMETER AND REPORTED AND ADDRESS.

JAMES A. MAGUIRE,

LUX CLEANERS, INC.

LUX GLEARERS, INC.

| appender

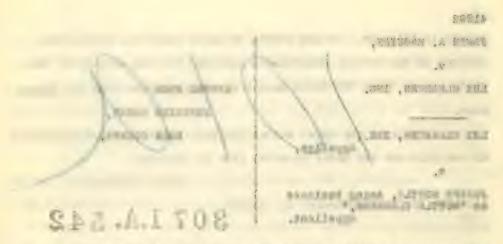
JOSEPE MOTTLE, doing business as "MOTTLE CLEANERS," appellant. SUPERICH COURT,

307 I.A. 542

MR. PARSIDING JUSTICE C'OOMER DELIVE OF THE OFFICE OF THE COURT.

November 16, 1936, James A. Maguire brought an action against the lux Cleaners, Inc., a corporation, to recover 13500 for damages on account of the claimed negligence of defendant in cleaning plaintiff's rugs which Maguire delivered to defendant Peptember 30, 1935. It was alleged that on the date of the delivery of the rugs the reasonable value of them was 13600, and when they were returned the reasonable value was \$1100. December 51, defendant filed its answer admitting it received the rugs Deptember 30, 1935, for the purpose of cleaning them, denied other matters and that plaintiff was entitled to no damages. Some orders were afterward entered and February 4, 1937, defendant filed its petition praying that the order of the court theretofore entered, setting the cause for trial, be vacated and that Joseph Mottle be made a party defendant. On the came day an order was entered vacating the order which set the cause for trial and leave was given defendant to file its amended answer within 20 days. Another order was entered on the same day that Joseph Mottle "be impleaded as a party defendant" and that summons issue as provided by \$25 of the Civil Practice act.

February 23, the Lux Cleaners, Inc. smended its answer by alleging that Joseph Mottle, as a matter of fact, performed the services in cleaning plaintiff's rugs, and if they were damaged it



PR. PREDICTED SUPPLYE O'LOWGE BUILDY: 9 WHE INTERED VE WIE GIDEY.

Povenber 15, 1936, James . Naralre brought on notion against the Lux Cleahers, Inc., a compendion, to recover : "ECO for animals at tradpolat to especifyed beside out to Invese de segment plaintiff's rage which to delivered to defendant terterior 20. 1935. It was alleged time on the date of the calivery of the race the reasonale value of them was 19600, and wice they vere returned the reasonable value was 11200. December 31, defendent filed 1te answer admitting it received the rage Esphesber 30, 1986, for the purpose of cleaning them, denied other outters and that what is antitled to no decempes, Some criters were afterward entered and Princip 4, 1927, Automian files his setting course runt on spine of the court theretors entered, estima the cause for trial, be vessted and that deseph wettle be note a purty defeadant, On the enme day an order was eatered vecting the order which see the cause for middie queens bedones att elit to Condented novin sam oveni bus Laitt 30 days. Asother erder was entered on the same day that Joseph dottle -ew as energ anomal and the transfer the analysis of vided by fife of the divil Practice act.

February 23, the last Cleaners, Inc. amended the uncome by alleging that the contract of February Amended the uncome of February and the entire Amended Amende

was his fault. The next that appears in the record is a pluries sussons dated June 17, 1937, which was served on settle July 9, 1937.

Nothing further appears until the following March 3, 1938, when an order was entered dismissing the suit for want of prosecution and although the suit was dismissed, no one seemed to have isarned of this fact, and september 20, 1938, the Lux Cleaners, Inc. filed its claim against Nottle, in which it alleged it had received the rags from Maguire and turned them over to Nottle who did the actual work cleaning the rugs, and if Lux was held liable to Maguire, Nottle should be required to pay Lux.

The next that appears in the record was that becember 2, 1938, a stipulation between Maguire and Lux Cleaners to set aside the order of march 3, 1958, dismissing the suit for want of presecution, was filed. On the same day an order was entered which recites the cause case on to be heard upon the stipulation between Maguire and Lux Cleaners, Inc., and it appearing that Joseph Mottle had been impleaded as an additional defendant and had been served by process, that he was in default for failure to file an appearance, that the cause was dismissed through misprison of the clerk, and the action was reinstated. Obviously Nottle was not in default. Then he was served there was no pleading in the case claiming anything from him, and when the claim against him was afterward filed he was not notified and no rule was entered on him to answer the claim.

After the order of December 2, reinstating the cause was entered, the next that appears is that February 3, 1938, counsel for the Lux Cleaners served notice on counsel for Maguire, supported by an affidavit, that he would ask the cause to be put on the trial calendar. April 24, counsel for plaintiff served notice on counsel for the Lux Cleaners that he would move the court to set the case for early hearing. The notice recited that a default had been taken against Nottle because he had failed to appear and answer, and april 24 an order was entered in accordance with the notice, which recites

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was his foult. The next that appears in the second in a pluried summand dated dane 17, 1927, which was repost on forth daily a, 1927.

Mething turking ammare until the fedlering care is all procession when an arder was entered distincted the matt term was all procession and adjusted the mails was dismitted, as one second to neve because of this fact, and section is, 1976, the lax Clements, inc. Itled the class against wotte, in which it alleged it had readyed the ray about work from Lymine and turned them ever to wottle the aid the mother work eleming the regard, and if had see held limbic to again, atthe character of the require, and if had see held limbic to again, atthe character of the required to pay had.

latt, a stipulation between Waynire and less diseases to set sette the cause came on to be least awar the estima incluses wasnire and lat Glennery, las., and it appearing that deserte but less had been earned by process, placeded on an additional defendent and had been earned by process, timt be was in default for fallure to file as appearance, that the seusona dismissed through misprison of the cises, and the action was reinstained. Obviously bettle our not in default. Then he was served there was no placeding in the case claims anything from him, and when the claim against him was afterwest filed he was not notified with me rule was entured on him to snewer the claim.

After the order of Beneher 2, reinstating the cours was
the next that appears is that Pobruncy 2, 1988, opened for
the Lux Cleaners carved notice on coursel for Espaire, supported by an
affidavit, that he would set the cause to be put on the trial
calendar. April 26, sounsel for plaintiff served motice on counsel
calendar. April 26, sounsel for plaintiff served motice on counsel

that on motion of counsel for Maguire it appeared that tottle had been served with summons, had failed to file his answer, and it was ordered that he be defaulted. This was obviously erroneous because tottle had not been notified, and no rule had been entered upon him to enswer.

May 18, 1939, an order was entered which recites the soming on of the cause to be heard on the complaint of Maguire, the answer to the claim of the Lux Cleaners, and the default of Mattle and "IT ID ORDERED that a finding of this court be and it is hereby entered against defendent and counter-claimant, LUX CLEANERS, Incorporated, and against JOLNESS OFTER, counter-defendant, and damages assessed against said LUX OL ANERS and JOSEPH COTTLE," for \$2500, and Judgment was entered against both. It is hardly necessary to state this was wholly erroneous as against mottle for the reasons stated.

June 16, Nottle, by his counsel, moved the court for leave to file a special appearance and to vacate the orders of December 2, 1938 and May 18, 1939, and it was ordered that Nottle be given leave to file a special appearance, and the hearing of his motion was set for July 13. On the same day, June 16, Nottle filed his special appearance and his motion supported by affidavit. June 23, the court entered an order, on motion of Mettle, which finds it had jurisdiction of the parties, and it was ordered that the motion to set aside the order of December 2, 1939, reinstating the cause be denied. The order of default and judgment against Nottle was vacated and he was given leave to plead within 20 days.

July 19, Mottle filed a document entitled "Flea of Defendant, Joseph Mottle" divided into two parts, "Motion" and "Answer." The motion was again to vacate the order reinstating the cause and the judgment. The answer part of this document avers that bottle and no knowledge of the allegations of the complaint, demands strict proof and denied liability. July 27, following, on motion of plaintiff Reguire, it was ordered that the plea of Mottle be stricken. It was further ordered that the motion of plaintiff to strike Mottle's answer be denied.

that on motion of councel for "ngaire it appeared that withe had been correct with summons, had failed to file wis answer, and it was ordered that he be definited. This was christally encouse broaden attle had not been motified, and no rule had over covered agon his to enswer.

May 18, 1888, an order was entered which resides the coming on of the cames to be beard on the complaint of legales, the secues to the claim of the less of the cases, and the definit of review and the same and the terminal of this court be and it is berein entered that a finding of this court be and it is berein entered and against Johlel Fifth, counter-defendent, and damped recessed against this CL ARTH and Johlel with with the left between the same this was whealty erreneous against both. It is hardly measured to state this was wholly erreneous as against this was

June 16, Metrie, by his semned, moved the cent for leave to special appearance and to vacete the criers of isomeher f. 1930 and May 18, 1930, and it was erdered that ferrie be given leave to file a special appearance, and the hearing of his metics was set for July 13. On the same day, June 16, Metric filed his special appearance and his motion supported by afridavit. June 15, the court entered an order, on motion of metric, which finds it had jurisdiction of the purties, and it was ordered that the motion to set make the order of because S, 1939, reinstating the cause be denied. The order of default and judgment against Mottle was vacated and he was given leave to plead within 20 days.

November 1, following, counsel for maguire moved the court to strike the enswer of defendant nottle because of insufficiency, in that it amounted to the general issue which had been abolished by the Civil Practice act. On the same day an order was entered setting plaintiff's motion to strike mottle's answer for November 21, and on that day an order was entered Senying the motion, and it was ordered that mottle plead to the claim made against him within 20 days.

December 8, wottle filed his answer in which he denied the sliegations that he had received the rugs to be cleaned. January 17, 1940, Nottle filed his petition in which he set up that it was agreed between the parties that he be permitted to examine the rugs and that he made such examination and was advised that damages claimed by plaintiff against Lux Cleasers had been settled. January 17, 1940. an order was entered on motion of attorney for Nottle giving him leave to file a supplemental answer, and on the same day a supplemental answer was filed which set up the settlement between plaintiff and defendant Lux Cleaners. January 29, 1940, an order was entered on motion of Mottle to take depositions of certain parties before a notary, and on the same day another order was entered an action of attorney for plaintiff Waguire, which recites that it appearing to the court that no notice was served on Maguire's counsel for leave to file his supplemental answer, the supplemental answer was stricken. February 5, following, enother order was entered setting the cause for trial February 15, and it was further ordered that certain parties assed be directed to appear before a notary to take depositions at the instance of Mottle.

Tebruary 18, the case was called for trial as it had theretofore been set for that date, and the report of the proceedings of
the trial discloses that when the case was called for trial, counsel
for sottle said: "we desire at this time to present a petition for a
change of venue. THE COUNT: You desire to present it at this time
after all these hearings that you have had?" After some colloquy

Navessor 1, Tollowing, sounced for families moved the oute to a strike the secure of defendant is the tenderal to the formal to the peace of the contribution of the flat is mounted to the flat there either has been abuliated by the Sing Sivil Tractice act. On the same day an order was actural netting plaintiff's motion to strike dottle's answer for kovember 31, and an that day as order was estained donying the motion, and it was ardered that Sir plead to the claim under against him within 100 days.

Docember 8, wottle filed his access in which he decied the allegations that he had received the rure to be cleaned. Assurery ly. 1940, Mottle filed his potition in which he set up that it was agreed between the parties that he be persitted to enumine the rape and that yd beninio anganat fair hoeitha naw bot molinelmene dans obam od plaintiff spainst lux deamers hed been ustiled. January 17, 1940, en order was entered on notion of atterney for mottle giving his leave letnesselegue a gas cas on the care as another the state of the contract of entwork was filled whileh set up the cettiewest between visioniti and defondost lur Cleaners. Josuszy if, 1865, sa order was estaved on a project actives status to essitioned entit of alife" to maire notery, and on the open day another order as entered on motion of saterner for plaintiff Magnire, which resires that it aslemnuss a eximpel as herror saw soliton on facil frues all of gairbes weren fateuntages all gureau lateuntages all all at reach the vae etrichen. February B. feliouing, accider order was entered potalny the cause for trial February 18, and it was further ordered of graton a groted geouse of beforeth no bosses selfres station full take depositions of the instance of Nottle.

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for Nottle said: "we desire at this time to present a petition for
change of young. The Could's You desire to present it at this time
that all these hearings that you have sait?" After some collocuy.

counsel for the Lux Cleaners objected on the ground that the motion for change of venue came too late since the case was set for trial some time before for rebruary 15. The court permitted sounsel to file a netition for change of venue but denied the motion at the time stating to counsel for Lux Cleaners to "draw an order denying it, and counsel, set up the reason that you know of for denying it. " on that date the court entered an order, apparently prepared by counsel for lux Cleaners, in which it was stated "that the motion for shange of venue has been filed for more than thirty days since the return of summons *** against *** Mottle, and there being two defendants to the action and consent to the application having not been had by at least three fourths of the parties in accordance with Mection 9 of Chapter 146 Ill. Rev. State. 1939", it was ordered that plaintiff's petition for change of venue be denied. The case then proceeded to trial, counsel for the three parties being in court, and at the conclusion of the evidence judgment for \$500 was entered in favor of Lux Cleaners against Mottle and he appeals.

Counsel for Mottle contend the court erred in denying its petition for a change of venue on the ground that the reason stated in the order, viz., that Mottle had not complied with the provisions of par. 7, chap. 145, fil. Nev. State. 1939, was unwarranted because there were only two parties at that time interested in the case. We do not stop to consider the reasons stated in the order or the argument made, because the record discloses the motion was not denied for that reason but for the reason that it had not been presented in apt time. This appears from what we have above quoted from the report of the proceedings of the trial. We think the motion for a change of venue made at the time the cause was called for hearing came too late and was properly denied. Caplow v. Haplow, 156 fill. App. 389.

souncel for the last Cleaners objected on the terms the the motion laint well for her pase out ponts and took once mover to speak ust some time before for interacy it. the court vareitsed counsel to file a petition for change of venue but demint the sortion of the view seasing to counsel for bur sless or each and season of paisage counti, set up the resent that readmon of for despine tt. . . a tart Ante the court entered as order, apparently prepared by coursel for ing Cloracry, an which is was stated "that the wellow for change of remains heet filed for more than thirty capa cause the nettine of notice and consens to ten application invited and been had be no loant three Fourths of the perties in accominge with Testing 8 of Chapter hed lifts for . States, 1980's at authors that plantainty pertains for change of verue he dealed. The case then proceeded to telal, counced for the three parties being in court, and at the conclusion rul to cover at terestan and tills, and describet consider out to ALDRON HE DER REPTER COLLEGE PRINCIPLE

Councel for Mattle contend the neutraried in denying the position for a change of venue on the ground test the reason chand in the ender, vis., that Mottle had not compiled with the provisions there were only two parties at that the compiled in the cook. "e de not also to consider the reasons stated in the order or the expansion and, because the reasons that it had not been preceded in apt time. This appears from what it had not been preceded in appears of the trial, we think the metion for appears from what we have show quoted from the empore of the trial. We think the metion for a change of venue made at the time the cause was called for bearing case too late and was prepartly denied. Capley v. Capley. 202 111.

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missed for want of prosecution March 3, 1938, the court had so jurisdiction to reinstate it Mecember 2, 1938, since more than 30 days had clapsed since the date of dismissal. If the point was properly preserved there would be merit in the contention but the error was waived by counsel when he appeared on numerous occasions having the and court enter orders, participating in the trial of the case. Landstra v. Landstra, 226 Ill. App. 293, and cases there cited.

The evidence shows the rugs were delivered by Maguire to the Lux Cleaners and the latter, not being in position at that time to clean them as requested by Maguire, turned them over for that purpose to mottle who afterward did the work and returned them. The measure of damages in such a situation is the difference in value of the rugs at the time they were delivered to Lux and when they were returned to Maguire.

Counsel for Nottle contend the evidence is wholly insufficient on this question to sustain the Judgment, and we think the contention must be sustained. This seems to have been the view of the trial judge except for the fact he was of opinion that since the evidence showed the Lux Cleaners had paid Naguire 1800, there was at lease damage to that extent. (Lux testified he paid Naguire 1800 "to leave me alone.") but we think this is a misapprehension. Without going into detail on the question of evidence, we think it clearly appears that there was no evidence of the value of the rugs at the time Maguire delivered them to Lux.

Complaint is made that the evidence as to what saguire paid for the rugs was inside is not the law where goods such as rugs are bought at a fair sale. Nothing appearing to cast suspicion on the transaction, it will be presumed that the price paid is the reasonable value of the goods. Cloyes v. Plaatic, 251 Ill. App. 183. But in the instant case Magnire testified he had brught one of the rugs at

elegand for went of prospection March W, land, the court had no jurisdiction to reinstate it less for S, LESS, times may then 30 days had elegand since the Asis of similars. If the point was present prospected there would no morit in the contention out the error was emired by counted then he appeared on marrous cosesions saving the court enter orders, participating in the trial of the case. industrasourt enter orders, participating in the trial of the case. industra-

The dux distance shaws the rays were delivered by equire to the bas dux distances and the latter, not being is parition at the time purpose to dottle two afterward did the work and recorned them. The manager in much a situation is the difference in value of the rays at the time they were delivered to law sed when they were returned to day when they were

Counsel for Notele contend the evidence is weelly insufficient on this question to custain the judence, and we think the
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evidence showed the last Cleaners has paid vapuire 1870, there was
at losse damage to that estent, (Lux testified he paid magnire 2500
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out going into detail on the question of evidence, we think it
olearly appears that there was no evidence of the value of the ruge
at the time Magnire delivered them to har.

Completet is made that the evidence as to what Magnire paid for the rugs was inadmissible because such fact did not tend to grove the value of the rugs. This is not the law where goods such as rugs are bought at a fair sale. Nothing appearing to cost such dis the transaction, it will be presumed that the grice raid is the reasonable the goods. Closer v.Plastic. Sti Ill. App. 182. But in the instant case Negular tueblished he had bought one of the rugs at

an auction at not aprings for 12350 about six or seven years before. It was sent to be cleaned: that he bound another run in 1975 or 1976. (which was ten years before the rugs were delivered to Lux for cleaning) for which he paid \$500 or \$575; that he bought another of the rugs from a collector; that it was a used rug; that he bought it because it was a very fine antique rug and he thought he paid 420 for it. A witness, who was familiar with the value of such rugs as the ones in question and who seemed qualified, called by the Lux Cleaners testified he examined the rugs after they were returned from the cleaners and gave his opinion as to the value of the rugs at that time and that they would have been worth if there were not certain defects shown. Counsel for the Lux Cleaners, after analyzing the testimony of this witness says: "I disagree with appellant [Wottle] when he states that the only testimony in the record which relates to the value of the ruge in question is the testimony of Haguire as to what he paid for them and the value after builment as testified to by the expert witness, and submit that both the value at the time the rugs were delivered to the bailee and the value at the time they were returned to the bailor was testified to by the witness, Harry Dagdigan, an expert."

we think the evidence does not sustain this argument. As stated, the rugs were purchased by Haguire - one at auction and another secondhand - a number of years before they were sent to the cleaners. They were in use during this period. The evidence as to the value of them when purchased by Maguire is wholly insufficient, and there is no evidence of their value when they were sent to the cleaners, and therefore the judgment cannot be sustained.

The judgment of the Superior court of Gook county is reversed.

JUDGMENT REVERSED.

an quetion at dot Springe for called about old of seven passes before, Is were ence to be classed; that he bought encites my in late or like, CHILDRE NO. TO THE PLANT WHEN THE PART HER THE SEC AND THE PART OF to restrong suggest and test (\$900) up COO; bleg out deldy you (pulmosis Il Tigues od Tell type bold a new il Ted telegation a most again and well of the of figures of his yet caption out? yet a new it commed it. A wilness, who was familiar with the value of such . were no the ones is question and who weems qualified, believed by the bar Cleventra becilied he exemined the raje ofter they were returned from the. closers and pare ble colubes as to the velue of the rays at time the and she tief would have been worth if there men to the pair defeats above, (quessi for the ter discours, ofter amilgring the variety weds [offens] inelleges dith sequents ?" layer secold add to upon and educate that the only territory in the recent court sent action on define of an enimal to question to the transfer of materials of the cults be said for them and the value after bellment on tertified to by the expert witness, and outsit that both the volue at the time the rage were delivered to the baller and the value at the the that were switched to the Vallar was besilthed to be discuss there of because

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doing business as Comman.

MOTOR SALES.

100110/0

FRANK G. STACIF.

Company of the fact of the second

Appellant.

OIROUTT-GGUAT,

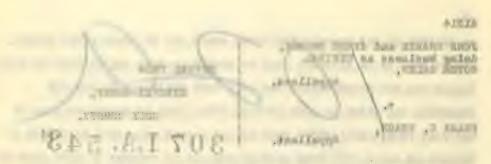
SOCK COUNTY.

307 I.A. 5431

MR. PARISIDING JUSTICA O'CONSUM DELIVERED THE OFINION OF THE COUNTY.

court. The justice customs recites that the "cause is an action for the payment of """ contract for garage rent for 500." The case was tried eptember 19, 1938, before the justice. On Teptember 25, the court entered judgment in plaintiffs' favor for 500, and as a part of the judgment found there was "due the plaintiffs from the defendant """ (500 in an action of assumpsit for monies due on a contract for garage rent." An appeal was taken by defendant to the direct court of Took county where there was a trial de novo February 27, 1940, a finding and judgment in plaintiffs' favor for 519, and defendant appeals.

Justice of the peace could not exceed \$500 (par. 16, ch. 78, Ill. Mev. Itats. 1959), and on appeal to the dirouit court where "the court finds an amount due in excess of the jurisdiction of a justice of the peace and renders judgment for that amount, its judgment is void," and Remmingway 50. v. Meagle, et al., 181 Ill. App. 5, is chiefly relied upon. In that case suit was brought before a justice of the peace of tangamon county on a judgment and it seems to be assumed that the jurisdiction of the justice at that time could not exceed \$200. Neither the amount claimed in the justice's summons nor the amount of the judgment rendered by the justice appears. An appeal was taken to the County court where the case was heard before the court vitabut a jury. The court in its judgment ordered the clark to assess damages at \$222.23; that plaintiff have and recover that amount free defendants



na, parriers for discondentaly described as delicaes.

court. The justice suscens recites that the 'espec is an estion for tried 'eptomber 10, 1858, before the justice. In testinies 15, the court entered judgment in plaintiffs' favor for 500, and as a part of the judgment found there was "due the plaintiffs from the defendant of 2800 is an action of assumptit for meales due on a condess for garage rest." An appeal was taken by defendant in the Circuit court of four county where there was a trial in many February FF, 1947, a finding county where the was a trial in many February FF, 1947, a finding and judgment in plaintiffs' fever for 1828, and defendant eppeals.

Justice of the peace could not exceed 1800 (pur. 16, ch. 70, 111, kev. Itatia. 1600), and on appeal to the direct score the court score the court fine court fine court fines an amount the in excess of the justice of a justice of the peace and renders judgment for that empact, its judgment is void," and Peace and renders judgment for that empact, its judgment is void," and Memiliarus Co. v. Fengle, et al., 181 [11]. App. 3, is chiefly relied upon. In that case suit was brought before a justice of the peace of Jurisdiction of the justice at these could not exceed that the jurisdiction of the justice at these could not exceed 1800. Neither the amount claimed the furties appears. An appeal was taken to the Judgment case was been before the second which a jury. Judgment sease was been the court in the judgment ordered the claim to show a damage with 1800 and 1

and the judgment order continues, "And now on this day """ comes plaintiff "" and on its motion it is ordered by the lourt that the sum of JR. 22 be and the same is remitted to said defendants out of the judgment heretofore rendered against them in this court. " The court reversed the judgment holding that the County court on appeal was without jurisdiction to render judgment for more than 1800, Justice Creighton dissenting. The court there said: 'Plaintiff also inviste that although the original judgment was rendered for an amount in excess of the jurisdiction of the justice of the peace, that the fact that the justice of the peace originally rendered his judgment for an amount within his jurisdiction and because the resittitur entered by plaintiff in the county court reduced the amount that could afterwards be collected on the judgment to an amount for which the justice of the peace had jurisdiction, the question of jurisdiction is finally and conclusively settled. It will be conceded that if the amount due at the time that the justice of the jeace rendered his judgment was for an amount within his jurisdiction, then on appeal to the county court, interest which accrues after the judgment rendered by the justice of the prace may be added to the judgment on appeal although it does thereby render the judgment in excess of the amount of which the justice of the peace had jurisdiction; but where such is the case, the record must disclose such facts; but the assunt for which the county court rendered judgment is in excess of the amount for which the justice of the peace had jurisdiction with legal interest that might have accrued on the judgment rendered by him between the time of the readition of his judgment and the hearing in the county court."

Justice Oreighton was right when he said be "discents from the views herein expressed and from the conclusion arrived at." In that case, as stated, the amount sought to be recovered before the justice of

and the judgment order continuos, "And now on this day """ coase add faid from out yo harakyo ai th neitum ath me has and llifeiale to see as and the came is real that or make defendance on to the judgment heretefore rembered against them to this court. " he ire . a no traca glanci sint that this interpolat wif becaves state with many over our traction to mende the rail track track that were Jupylee Traignion diseasing. The court there waid: "relatiff also storms on any hornings and honorist Language and spending full with a fall and one said the formed and the selection of the fraction of the second from the the justice of the process will restore the judgment restition and record has calicided the real bid rists amount as the affect the plaintiff in the county court pained the mount that acult ads daine vol sacces as at sample; will be bestelled ad abramate si noireleast to neise on the tolleries, the consens of the said and Planily and somelandery noticed. It will be someshed that if the aid becales outer and to entropy add fadd and and to sub formers of League so and the collection old sittle former as were our thoughol bryolany formulat oil with recent makes dispented , Proce Course and leegan ne rangent eds or bubbe of the noney old to solvent edd to elthough it does thereby reader the judgment in excess of the prount at dour exact ful trainstilling had some out to saltest add doing to the dase, the record must disclose each facts; int the ancies for spines out to apour at at through! becaber trees where out dates and fugal as to unisolate the come and the solitant and solder and terest that eight have seemed on the judgeout sendered by him between the time of the readition of his judgment and the meeting in the The second secon

or may unable to agree with this reasoning but think in.

Justice Craisisten man right when he crid he "dissente from the views,

involue apprensed and from the searclasion arrived at." In that oner

the court account sought to be recovered before the justice of

the peace and the amount of the judgment rendered by the justice of the peace do not appear.

in appeal from a judgment rendered by the justice of the peace interest is not to be computed on the judgment rendered by the justice of the peace but on the amount of plaintiffs' claim made in the justice court. The trial is de novo. Tindall v. decker, 1 cam. (2 Ill.) 137. The court there said the second error relied upon in that case for reversal was "that if the interest at the rate agreed on in the notes, was allowable, then the amount of principal and interest was over 1100, and the Court could not give judgment." In holding this contention untenable the court said: ".hen the action was commenced, and the judgment rendered by the justice, he had unquestionable jurisdiction of the cause. """ Now, can it for a coment be allowed, if no appeal had been taken, that the justice and constable would have been trespassers, if an execution had been issued on the judgment, and the defendant's goods taken and sold? To state the case is sufficient to show the unreasonableness of the proposition that the defendant by taking an appeal, and by subsequent delay in the Circuit Court, until the interest had accusulated so as to make the plaintiff's demand exceed 1100, such subsequent accumulation should relate back and sust the justice of jurisdiction of a cause of which when adjudicated he had legal cognizance. The rule in such cases is, if an inferior court has jurisdiction ab origins, no subsequent fact arising in the case, can defeat it, when it was lawful in the inception. "

In the instant case, the suit was brought to recover \$00 - within the jurisdiction of the justice court. Judgment was entered for that amount and the fact that an appeal was taken and a judgment entered for 10 more than the amount claimed ices not cust the court of jurisdiction. The report of the greezedings of the trial is not

the peace and the amount of the jair cent produced to the justices of

on apacel from a judence of conserved by the laserage of the add to be along the milet oil so lednesses at of lan al deviable equal at show sinte 'ethicate to faram one for your out to confect the Justice court. The trial is de nove. It shall to bree & due. at moon toll of the owner will the never error tell the bornes of a set in increased all lists and increase out seed Indi on in the motor, was allowable, then the amount of colorinal and at " . From the tree and the Court and the call town and regressed neites and make this terms wis aldered a selfecture of the series was commenced, and the judgment residence or the instinct, in man one constitution jurisdiction of the cause. It is the the court be allowed, if no eggeel had heer taken, the birt janttee and becast have had notterers as it excesses to be the lad been largered are of this less to acid the defendant of the Less to be and the the cese is cullicient to show the normanisment of the propertion plysian decomposed by and, isotops an apider of received the fair asian of the or her flamence had decreased the Illent , recon time I out anifal wood the property and the property and account the plant of the property of the propert to sense a to notivitation; to added the touch and adalar Almous wild shen adjudicated he had lagal somittened, The rale is such dense is, it as inferior court has jurisdiction of critics, no sub-Drived they fit made out the trade one other and all paragraph fout transport in the inapplement

In the instant case, the suit was brought to recover this -chinks the jurisdiction of the justice sourt, indywest one extend for
that smount and the fact that as arpeal was taken and a judywest ontend for (10 more than the amount claimed foce set out the court
of jurisdiction). The report of the grocestings of the trial

and line

in the record so that we are in the dark as to how the sl9 isoluded in the judgment was brought about.

The judgment of the County court, as other judgments, is presumed to be in accordance with the law. Alley v. NeCabe, 147 111.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

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in the record so that we are in the days on to the the its included in the judgment was brought about.

The judgment of the 'ounty court, as other judgments, is presuced to be in accordance with the last allog v. 'Sizig, is Ill.

The judgment of the viroust court of Joos county in affirmat.

Tubence, J., and Teluraly, J., comour.

JOHN SIMON.

.p. ellen, "

V.

HAROLD J. GREEN, doing businessas GREEN REALTY COMPANY,

Appellant.

APPEAL TRON

MUNICIPAL COURT

307 I.A. 543²

MR. FURRISHE JUSTICE O'CORNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover 100 for work he had done for defendant as a janitor. The statement of claim set up that defendant had given plaintiff a check for the 100 dated May 19, 1931, and signed by the "Green sealty Company, It further Harold J. Green."

appeared that on the next day plaintiff went to the bank on which it was drawn but found the bank was closed and therefore the check was not paid. During the trial of the case, which was before the court without a jury, counsel for plaintiff asked leave to smend the complaint on its face to conform with the proof, i.e., to show that plaintiff had earned 100 wages as a janitor for the month of May, 1931, and it was treated as though the smendment had actually been made.

The defense interposed was, (1) that the check was the obligation of the Green scalty Co., a corporation, and the corporation was not a party to the suit, and (2) that even if the evidence showed that defendant Green had orally promised to pay plaintiff 90 for work done by him in May, 1931, it was barred by the Five Year Statute of Limitations.

The undisputed evidence is that the Green Tealty Company was incorporated Earch 23, 1931. On the hearing counsel for plaintiff stated to the court that he was suing on the check signed by defendant Green "who. I believe, is an officer of the corporation." It is unnot disputed that the corporation was made a party defendant.

on the second point plaintiff's avidance was to the effect that Jreen had orally promised to pay plaintiff and for the sork he

that or it each or clower cabe? Since idente, m

Plaintiff brought outs against defections to concrete to for your bed and for work he had some for defendant as a justiser. The statement of claim set up that defendant had given plaintiff a check for the 10 dated way 10, 1971, and signed by the "dreen healty income, it rurther Barold J. erren."

appeared that on the next day plaintiff were he the each or which it was drewn but found the best was closed and ingressive the chock our not peld. Juring the tried of the case, which was before the court vithout a jury, counsel for plaintiff eshed leave to ancel the complaint on its face to conform with the error, i.e., is show that plaintiff had earned 10 wayes as a junitor for the worth of day, 1001, and it was tracked as though the executions had estually been made.

The defense interposed wee, (1) that the chock was the obligation of the freen Sealty Co., a comporation, and the corporation use not a party to the suit, and (1) that even if the evidence chosed that defendant dress had crally presided to pay plaintiff (1) for work does by him in Mey, 1831, it was becree by the Few Sear Statute of

The undisputed evidence is that the freen selty company was incorporated Morek TO, 1901. On the besting constel for plaintiff that he was maing on the check signed by defection drawn drawn "who, I believe, is an efficer of the corporation." It is unnot

On the second point plaintiff's evidence was to the effect

did in the month of May, 1031. Defendant contends that the liability, if any, under this promise would be barred in five years, citing \$15, sh. 83, Ill. Nev. State. 1939, which provides that actions on unwritten contracts express or implied and all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued. The instant case was brought extender 1, 1939, more than eight years after the claim was due, and the claim was therefore barred.

the claim, if any, against defendant dreen having been barred by the Statute of Limitations, the judgment must be and it is reversed.

JUDGMENT REVERBED.

Watchett, J., and McSurely, J., concur.

did in the month of thy, 1001. Peterion; contends the time libility, if any, under this proutes rough to the payre, citing \$15, wh. 82, 111. Sev. State. 1885, which provides the testions on unvertient contrates express or implied and all civil sevious set order-wise provided for shall be commenced which five outer and after the cause of sevious neutrons. The instant case was brought reptender 1, cause of sevious states ofter the instant case we brought reptender 1, therefore heartest and sight poors after the civil was dec, and the civil was therefore heartest.

The claim, if any, spained defending here having need barred by the Statute of Lieitstions, the judycent meet be one to in revereed.

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In Re ESTATE OF DORA OSERHEIDE, deceased.

VILLIAM UDERMEINS

CITY NATIONAL MANE

Appellant,

APPEAL PROFES

CODE COUNTY.

307 I.A. 544

COMPANY OF CHICAGO, Executor of the Retate of Dora Oberheids, deceased,

Appellee.

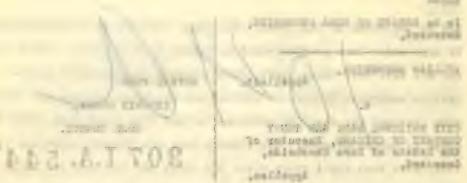
MR. PARAIDING JUNGIOR O'COMMON DELIVERED THE OPINION OF THE COURT.

Probete court for \$10,589.03 in the matter of the estate of Dora.

Obserbeide, his deceased mother. April 6, 1939, after hearing the claim was disallowed and an appeal taken to the Gircuit court of Cook county where the matter was heard, substantially all the evidence being introduced on behalf of claimant. The claim was again disallowed and he appeals.

The record discloses that Fora Oberheide owned all the capital stock of the Oberhelde Coal Company, a corporation, and her three sone, the claimant william and his brothers fred and Christian were officers and directors of the coal company and in the active management of the business. January 9, 1930, she and her three sons entered into a written agreement whereby she was to execute and deliver a trust agreement under the terms of which she would assign all of the shares of the coal company to a trustee, The soor were to continue to manage the coal business as officers and directors and to work harmoniously together. There were to be two other directors of the coal company whose duties were exterly to act as arbitrators in case of any disagreement among the sons. The contract also provided that "If the curplus and earnings of the " don't dompany, as certified to by a duly licensed public accountant, shall warrant such action, each of the second parties [the three sone] shall vote in favor of the declaration of quarterly dividends by the open of

20.00



THE CONTRACT OF STREET APOSTED A PRINCIPAL CO. CONTROL OF A SALE O

Folgrany 4, 1988, allian Storbald, riled wit in the gradule court for \$10,850.03 in the satisfactor of the artists of the corespond rather. April 8, 1930, first to the rice in aleis vas disallowed and an appeal taken to the circuit erar of test acumby that the rather wes heart, substantially all the critical bring introduced on taken of satisfactor in traduced on taken of standard. The claim was explain the appeals.

The record displaces that Your Prevents available from the espital electronic time Charleside Coal "teguny, - comporation, and have three sone, the claiment illiam and his brothers from and ancientation arises all al has you are loss sell to erespect has eresitte arise monte seems of the bariance, Jacuary W. 1816, she and har three come entired into a written agreement whereig one was to appear and for spines binos ain delda le savet all tabes fremenya famil a revil asternit a of the contact of the sound to it is continue to manage the coel business as efficers and directors and to work harmonisualy teasther. There were to he too other directors accountities as the or vivelue sees selded according according to the in ours of any directedness enoug the rous. -our cals fourteen off to that the furgius and employed the antique of the badt body as corrifted to by a duly licensed public accountant, thall wereat each at the following sand parties [the three mone] shall vote in le Aquel eds ys absolivib thresteen le ne

Directors at the rate of at least Twelve Thousand Pollars (#12,000.00) in each year commencing January 1, 1929, " until the death of Are.

Oberhoids. In addition thereto the contract provided for back dividends for any preceding year in which dividends of 112,000 had not been declared.

into a written trust indenture with the Central Trust Company of Illinois, whereby all of the stock of the coal company which belonged to Mrs. Oberheide, was transferred and certificates issued to the Central Trust Company to be held by it as trustee, and it was required to vote the shares of stock for the election of the three sons as directors of the coal company and after the deduction by it of its fees and expenses, was to pay Mrs. Oberheide the dividends received by it from the coal company until such dividends amounted to \$17,000 in each calendar year. On the death of Mrs. Oberheide the trustee was to distribute the shares of stock equally among the three sons. At the time of the execution of these two decuments, Mrs. Oberheide was about 70 years old. The died January 5, 1037, at the age of 37.

Claimant's theory of the case is that immediately before
the execution of the two documents, the sons, after reading the agreement "objected to and refused to accept that provision of the agreement respecting the payment of \$12,000 dividends because business
conditions did not warrant it." Thereupon it was orally agreed that
if the dividends earned did not amount to \$12,000 a year Mrs. Observable
would held in trust for the three sons the balance of the \$12,000
after deducting the amount of the dividends earned. Upon this oral
agreement being reached, the written agreement was executed by the
mother and the three sons.

On the hearing it was stipulated that the dividends declared by the seal company for the years 1932 to 1936, both inclusive, and paid by it to the Central Trust Company, as trustee (who in turn paid Hrs. Oberheide), exceeded the dividends carned by \$21,787.10 Dipostora at the rate of at least inclus internal college (11), 510, 75)
is each year commonsing demant i, 1849, 'autit via in the of tre.

dividends for any preceding year in which dividends of in, 700 h...
not been declared.

Claiment's bloody of the same is the the limits before the evenution of the two decuments, the same, after residing the agreement 'objected to and refused to samely that provision of the agreement respecting the payment of all,000 dividence because business conditions did not marrant it. 'Thereuren is mer orally agreed that if the dividence cannot did not have seen in 12,000 a year for Corrheit would held in trust for the three sons the balance of the 112,000 after deducting the amount of the dividence carned. Open this and after deducting the amount of the dividence carouted by the agreement being reached, the written agreement was encouted by the sother and the three cons.

 and william, the son, claims one-third of this amount or 10,690.03 to be due from his nother's estate. On the oral argument it was stated that the other two sons have similar claims pending for the other two-thirds.

Frank L. Hume, a lawyer practicing at the Chicago bar for more than 30 years, called by claimant testified he knew fro. Oberhelds in her lifetime, her family, and also .r. D. 4. the attorney who prepared the two documents; that he was present January 9, when the two documents were signed; that Mr. Mann drew the contract and trust agreement; that at the meeting there were present wro. Oberheide, Fr. Jana, the three cone and Dophia Enceptel, a daughter; that the papers were examined; that the three sons objected to one provision of the contract which provided for annual dividends of 12,000, and stated they would not accept that provision for the reason that the coal business did not warrant such annual dividends; that Mr. Mann then stated there could be no change in the contract hecause he had devoted too much time to the preparation of it and of the trust agreement. Thereupon Mrs. Oberheide said she would not exsect any dividends if more were earned: "I won't expect my boys to gay anything they do not earn; " that with this understanding, the contract was then executed. Wr. Nume was the only one present at the meeting who testified as to what was said at that time. Counsel for claimant sought to have the three sons testify but, on objection, they were held incompetent and thereupon counsel for claimant made in offer as to what their testisony would be, but no point is made in this court that the court erred in refusing to permit then to testify.

Claimant called Clara Numenhagen, a daughter of Tre.

Obscheide and sister of the three brothers, who testified that in

February, 1935, she was at her mother's home in Chicago and the three

sons were there at the time; that her brother "Chris" said to his

mother: "We cannot pay you the dividends any longer, as the business
does not allow it;" that the cost business lost money in 1935 and would

and tilling, the row, claims coresular or take a stack op 15,000,000 to the document is the same to document the same atakent they the other than some large about a delice could be same there about a delice could be same.

Total de apposite and the edictions, warrand a to all things more then 2) years, selled by cloterat fertilled be be a true, attorney who are a fine two documents; that he are are and drauge A sing the red invested our expedit that it, then invested our and the commence of the same and the same of the commence of the c Conficie, in land, the three cone and imple been it, a daringer; The tile person and in the the time and the to the second of the time. to absolivib forms out ballyers deing resting out to solsivers till, 300, tild stidlet they would not knowed that postilize for the rabashivit Levens down France of the second cold self torong tiat Mr. Manu then etated there sould be no charge in the engines because he had devoted too much time to the presented of it and of the sereement. Therewere true thortasts and the mould not are page any divisorit if none reread: "I cante expende to -nee and implies the saint that the care too dignit water and treet man then essented. My, Mane was the only our present at the marking the bestiffed as to that was made at the time, Connect for claimant som ht to Mayo the three seas the but, on objection, they refle in other insolete not fearest negocytelf ban ineference high ever and the their testinent routh to, but so reint to and this court that for south firmed is palmeter at borre bruce and fact truck

Viciont onlied Clara bimechare, a daughter of Fre.

vostbalde and sister of the three brothers, who tertified that in

vobracy, 1932, she was at her nother's home in Chroses and the three

sons were there at the time; that her brother "Chris" said to his

c sunnet yay you the dividends any longer, as the brothers

the coal business long money in 1538 and would

lose more in 1936, and he said: " You know the agreement we made with you about the dividends. ! To sother said, 'Yes, boys, the dividends that you said me that the company did not capa, I am holding that money in trust for you boys, and as I promised you when we made that trust agreement, when we signed that trust agreement, I am going to give each of you boys one-third as you worked hard for it. " witness further testified she had another conversation with her mother at the latter's home in December, 1936, the Friday before Christmas; that she was called to her mother's home by her sister, Dora; that the mother was not well and they needed a nurse "to I stayed there was for eleven days:" that she mat with her mother in the redroom all alone. "Jother said to me, *** 'Clare, I am not going to last much longer, *** I want the household here, everything, to be shared with the two girs. I want you to take whatever you want, and the boys will get more than you will ever get, "" The boys, you know the dividends that they gave me that they did not earn. I am holding that meney in trust as I promised them, and I am going to give each boy one-third as they have worked for it. "

the business of "boiler making and heating;" that he knew Frs.

Oberheide is her lifetime and had a conversation with her is vetober, 1975, when he put a heating device is her home; that no one else was present; that she saked him to sit down in her living room, which he did, and they talked about things in general; that she told him she and her sone had entered into "an agreement on the dividends" - the boys were to pay her each year; that she asked him if the business wasn't doing well and he said "Yes, you should be happy to have boys that work as hard for business as they do;" that she said: "'pa, if he were living today, would also be pleased.' The said, 'I am pleased and happy about the whole thing.' Nothing else was said about the dividends at that time." He further testified that he spoke to Frs. Oberheide in February 1985, when he was in St.

loss mare in 1968, and he said: ""Yes know the knownear we go be with you about the dividends. * To making that, tes, haye, the dividends that you paid me that the company did not come, I am inciding ting money in truck for you hope, and or I promised you wise so nede task trust agreement, when we olimed they trust agreement, I am colog to mire canh of you boys one-third as you worked bard to it. " The recitor ten illie meltaryyane recitors bud alle bolkitost recitris arenthe at the latter's base is impended, 1826, who frilly before conference that she was called to her author's home by har sister, your that the mother was not well and they needed a nurse to I staged there was fir asorbed will all under the bar to the bring the brings and order depairs of of qualifyrers ared Aladmond with hims I was purposed the two gire, I went you be take whatever you wash, and the boys will got more than you will ever get, were the teps, you man the dividends that they gave we that they did not seen, I am bulding that money in truth on I provided then, and I am estay to give each bay "I . it mit designer would until mit brild? - une

Obsided in her lifeties and had a consersation with her in setcher, Cherholds in her lifeties and had a consersation with her in setcher, 1875, when he pure absolute device in her living seen, which he present; that she she shed his to elt deve in her living seen, which he did, and they talked about things in general; that ane told his she and her sees had entered into "an expresent on the dividende" — the hops were to pay her each year; that she asked him if the impinese hops were to pay her each year; that she asked him if the impinese seen't doing sell and he sold "Yes, you should be harpy to have pleased and happy about the whole thing." Nothing slaw was neid pleased and happy about the whole thing." Nothing slaw was neid to the happy about the whole thing." Nothing slaw was neid

Petersburg, Florins, living near Frs. Oberheide's home at that place; that the three day, htere and the mother were living together; that he had a convergation with Frs. Oberheide one morning when he went in to bid her the time of day; that she said the three daughters were at the hairdressers; that she called him "Otto;" that she knew him as a boy and asked him to sit down that she wanted to talk to him; that he said "All right, Ma, what have you got on your mind? The said, 'Icu knew, Otto, the boys have an agreement with me,' she said, 'Last year,' which was 1931, """ 'they paid me really more than they carned. """ I can't see why they gald me more than they carned, but they did. """ after it is all said and done, """ The money they make I as holding it for them. "" That he then said "I think they are estitled to it because they worked for it, they worked hard. """ You know other coal companies have also been in the same boat."

There was no proce-examination of any of these vitnesses. This is substantially all of the material evidence in the record.

be think the evidence was insufficient to create a trust, but in any view of the case we are clear we would not be warranted in disturbing the finding of the court to the effect that there was no trust created. We saw the witnesses testify, as apparently did the judge of the Probate court. Soth found against claimant and what we said in Delce v. Leahy, 278 Ill. App. 178, we think applicable here: "It has long been well settled that courts lend a very unwilling ear to statements of witnesses as to what dead people have said." As also In religious of Carlson, 286 Ill. App. 81 (affirmed Morean v. Lat. of Garlson, 365 Ill. 482); Lea v. Folk County Copper Co., 63 C. J. 493; 22 Corpus Juris, p. 281; Laurence v. Laurence, 164 Ill. 367; Pierks v. The Elgin City Bankins Co., 366 Ill. 66; In religious, 304 Ill. App. 167; Massinson v. Massyinson, 367 Ill. 166.

In the Forcen case our Supreme court said: "In an action to

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There was no cross-examination of may of these withouts.

We think the owns we are elect we would not be warrented in disturbing the flating of the court to the sizest that the reach of the court to the sizest that the reach of the flating of the court to the sizes that the properties of the judge of the fronte court. Sold found squines alaband and what we said in the fronte outle over the found squines alaband and were if the long been well settled that courts lead a very unwilling ear to long been well settled that courts lead a very unwilling ear to the first outless denied dense we to the courts of a court for the courts lead a very unwilling ear to the courts of the founts courts for the courts of the founts courts for the courts of the founts courts for the courts of the founts for the courts of the founts of the

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recover against an estate upon an express contract to make a testamentary provision, uncentradicted testimony may be rejected if not clear and convincing. (Makeon v. Van alyek, 202 M. I. 302.) This court, in Laurence v. Laurence, 164 Ill. 367, well said: 'Evidence of mimissions made by a person since dead should be carefully scrutinized, and the circumstances under which they were alleged to have been made carefully considered with all the evidence in the case. The supreme Court of the United States, in Lau v. Folk County Copper Cq., 62 W. S. 493, observed that 'courte of Justice lend a very unwilling ear to statements of what dead men have said.'"

This rule of law is particularly partinent to the testimony of Clara Slumenhagen and Otto Gerstung. Clara's testimony is that she talked to her mother in February, 1936, and December of the same year, in which conversations her mother said she was helding the money in trust for the boys as she had promised to do when they made the trust agreement. This was more than seven years after the contract was made and this witness further testified that the mother said: "I am going to give much boy one-third as they have worked for it," which if true would only mean she was going some time in the future to make a gift of the money to the boys.

The witness Gerstung's testimony was that he talked to Mrs. Oberheide in February, 1931, when Mrs. Oberheide was holding the sonsy for the boys and said: "I am giving it to them." We think this testimony was wholly insufficient to establish the contention made by the claimant that a trust had been established for the boys by their mother in 1929.

It must also be borns in mind that attorney burs, who knew the parties and who was present at the time the contract was executed, makes no mention that Frs. Oberheide said she would hold any excess of dividends paid to her in trust for the boys. Wis testimony is that the said: "I won't expect my boys to pay anything they do not earn." So that the testimony of this witness can in no way be said to establish the creation of any kind of a trust.

The judgment of the Circuit court of Look county is affirmed.

Ratchett, J., and Modurely, J., concur.

JUDDENT AFFIRMUS.

recover agained an estate upon on estate to make a pastum mentary provision, unconfined testional out has sainested if not court, in learness v. investue, los iil. Set, well estat 'islance of afficience and a learness by a person since don's should be execulily estaticions and the circumstances under which they care alleged it have been base outerfully considered with all the evilones in the case. Lask evilones in the evilone is the case. Lask evilones in the chart case of the interestations and the evilone is the case. Lask evilones is justice lend a very unwilling car to characents of what do as non have fuelice lend a very unwilling car to characents of what do as non have incided and a very unwilling car to characents of what do as non have

This rate of law is particularly postions to the testimony of Clara Biasonhayen and ette Caretony. Clara's testimony is that the trained to have nother in Pohensy, 1888, and 'econion of his against year, in which conversations has notione said was rate holding the made for the tops as the trust agreement. This was seen than seven years after the test the trust agreement. This was seen than seven years after the test top and this alterna for the trust and this alterna for the trust and this alterna for a the tiny have earlied for said.

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The witness Geretung's testiment was that he telech to have.

It witness Geretung's testiment was that he think this hestiment was that? If an giving it to them. " he think this testiment was thally insufficient to establish the contention near by the plaisest that a trust had been actabilished for the boys by thaty

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If the suns are, unexpetue sets age west sent endene and the suns endene and the suns sines that the baye. His testiment is that the baye. His testiment is that the suns and suns and the suns and suns

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41304-41390

CHARLES H. ALBERS, Roceivor, etc., polloe,

V.

ANDREW H. DRESSEL, ot al.

AMDREW H. DRESSML and JULIA SCRANIE, Appellants.

Consolidated with

BERMARD HORWICH, etc.,

Appellee,

7.

AMDREW H. DRESSEL, et al.

AMDREW R. DRESSEL and JULIA SCHAPIL,

APPEAL FROM SUPERIOR COURT,

Consolidated

COOK COUNTY.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

307 I.A. 544²

MR. PRESIDENC FUNTION OF DURING DELIVERED THE OPINION OF THE COURT.

By this appeal certain defendance seek to reverse two

denotes entered in farmille or sells which been consolidated to
hearing upon one set of abstracts and briefs.

One of the suits was to foreology a trust deed given by Andrew M. Dressel as see-half of his farm in secure an indebtedness \$48,000, and the other is secure as indebtedness of \$35,000 on the other half of the farm,

Counsel for defendants in this court say, "There is no quantion and by this reserving pair same upon the avidance. The matter was in the service of sale.

'The question here tamesved is one of preeding. """ There is no allegation of preedentes or ownership or right, title or interest in and to the more and incabreament in question ellegat to be set forth in either of the complaints."

In support of defendants, contention counsel say, "The co-

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sorntiny of the pleadings, to wit: the original bill of complaint in the Superior Court case and the emended bill of complaint in the Circuit Court case fail utterly to show any right, title or claim in the plaintiff against the defendant or any title or ownership of the note in question to be in the plaintiff. The argument seems to be that because of the failure to allege ownership of the notes and that dead the decree cannot stand although the evidence may show the ownership of the notes.

This is all the argument in the brief and no reference is made to any particular allegations of the bills, but we are left to search the reword by one entries managing argument to supported after we manalise the complaints. It is not the daily of the court to searthrough the record to see if it can find errors in the allegation, This is the work of counsel and the Assress appealed from sight be affirmed without saying more. However, we have tonged into the atlegations of the complaints and find that such was brought by the reserver of a tent which was being liquidated, and in mach apples of the notes and trust deed were attached to and made a part of the coplaint and bue receiver alleged they would be produced in open dwart; In was complaint it was alleged the resolver was the owner and believe of the principal ante on which there was a balence of \$40,000 due and uspeld, and is the other emphaint it was alleged fiers was now los the complement \$40,000 on the other envigers indebtedness. There so marit in the scattentian. The production of the notes by plaintiin the two sults mee prime facts evidence of symerably in plaintiff. Hendarano v. Davisson, 167 III. 379; Dillag v. Electe, Sci III. 154; Estable v. Wright, 885 Ill. App. 804. We objection having been rule in the swial over: to the sufficiency of the pleatings, it seemed be urged for the first ties in a court of review. Brandtjen & Iluza. Int. v. forgue, 190 Til, App. 100; municipalitation of the contract of the con



Prologie v. feets, 299 Ill. App. 279.

In the Brandtjen & blunt, Inc., case we said: "The fire fine the attement of claim may not be reject for the fire time in the Appellate Court. Sec. 42 of the Civil Practice Act.

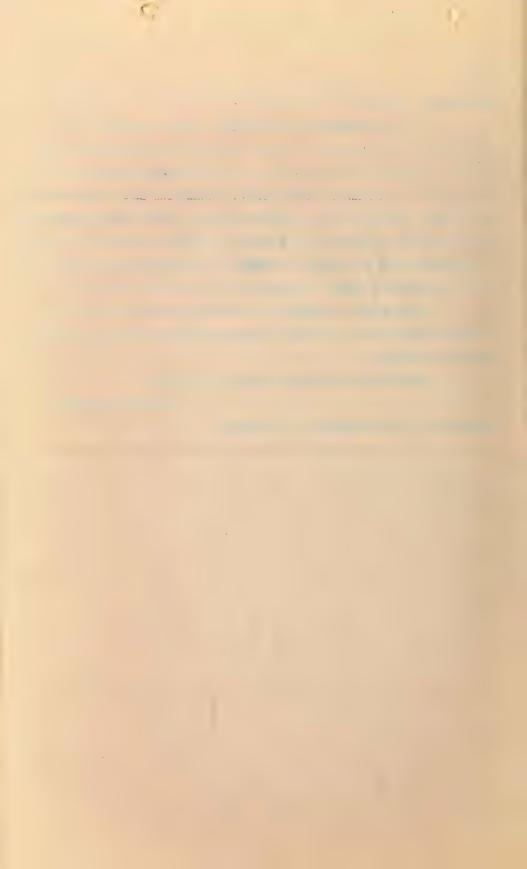
110, par. 166, Ill. Rev. State. 1937, provides: '(3) All defeat pleadings, either in form or substance, not objected to in the trice sourt, shall be deemed to be unived. To the same effect in Adda.

The ground alleged for reversal is frivolous and wholl-

The decrees appealed from are affirmed.

DECREES AFFIRMED.

Matchett, J., and McSurely, J., concur.



41453

DAINY (ZERNAH,

Appellee,

W.

OUT RY ROU, doing pusiness as IPEAL MEAT PARKET, and 1805 FALT PUSY STRUCT SUILDING COMPONATION, a Corporation,

Armar mor

SUPERIOR COURT,

COOK COUNTY.

ON ANY EAL OF 1935 HAUT 719T TRULE BUILDING CORPORATION, a Corporation. 307 I.A. 545

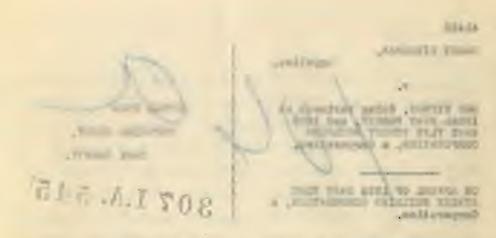
MO. PREMIDIRA JUNIOR GOOGNOU BELIVERED THE OVINION OF THE COURT.

Flaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained by her in elipping and falling on the walk in the entranceway leading from the sidewalk into a butcher shop conducted by defendant Eypres, who was the tenant of the other defendant, the 1935 East 71st Street Building Corporation. There was a jury trial and a verdict and judgment in defendants favor. Afterward the court set aside the judgment and verdict and awarded a new trial from which we have allowed the Building Corporation to appeal. Eypres the other defendant is not before us.

The record discloses that at the conclusion of the argument of counsel, on plaintiff's motion for a new triel, the court said:

"As one of the grounds for a new trial, plaintiff urged in substance that the court erred in submitting to the jury only two force of verdict, one, finding both defendants guilty and assessment of damages; and second, to find both defendants not suilty.

"On consideration of the force one, oint, the Court sustains



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Plaintiff brought an action system telendarie to recover course for personal injuries circled to have been considered by her in and falling on two well in the entreaceup leading from the time of the substant of the circles destroiced by definited lighted, who are tend to tend to tend in the recited and a regular red in the parent in action. There was a jusy trial and a regular red judgment in actions the indicate the judgment and anaction to appeal from which are have allowed the conjugation to appeal in action of have allowed the course that the conjugation to appeal. Express the other defendant is not

At the conclusion of the lastructions the court submitted and force of vertica to the jury, (I) ".... the jury, find the defendance of the subject of the su

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the contention and grants a new trial herein solely on the foregoing ground.

There is considerable argument in the briefs as to whether defendants were charged in the complaint with joint negligence or whether, as counsel for plaintiffs says: "It should be noted that the Declaration and Amended Declaration charge both defendants with two separate and distinct liabilities. The occupant, hypros, is charged with general negligence. The other, the petitioner, the owner, is charged with leasing defective premises with knowledge of such defect. etc. " Counsel for defendant, the Building Corporation, say that under the evidence it was entitled to a directed verific at the close of all the evidence because it showed there was no negligence on its part. For the purpose of this decision we shall assume that the cause was properly submitted to the jury. Even if the complaint charged defendants with joint negligence, yet the jury might find one defendant suilty and the other not guilty. Linculat v. Modgen, 248 Ill. 491; Covenant Club of Chicago v. Thompson, 247 Ill. App. 122; Skala v. Lehon, 258 Ill. App. 252 (affirmed 342 Ill. 602); Pearlman v. W. O. King Lumber Co., 302 Ill. Apr. 190.

It is conceded that verdicts should have been submitted to the jury so that it might find either of defendants guilty or not guilty and if counsel for plaintiff was without fault in the two forms of verdicts which were submitted, the motion for a new trial was properly allowed. But counsel for defendant say that before the jury retired the record discloses that defendant's counsel who was trying the case requested the court to submit additional forms of verdicts so that either of defendants might be found guilty or not guilty but that this was objected to by counsel for plaintiff, and therefore he cannot take advantage of the error complained of. Counsel for plaintiff says that when counsel for defendant requested additional forms of verdict, the jury bad retired and therefore it was too late, but we think this is not borne out by the record.

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There is considerable errowert in the heists as to whether as consisted were charged in the conclusion with scing sentimenes on dead in the contract for the state of the st diff ainitable ited synthe selection between the solinealout of bus segapate and firther liabilities. The accuracy, Egype, to charged with general negligence. In other, the publishmen, the owen, to conrect with leasing defective premises with besides or such defect, etc. " Counsel for defendant, the infiliar are reston. so tologer herealth a of helpline our it amobive all unben lade que -ilian on any event isuals of coursed consider add iin to cools add conce on its part. For the purpuse of tain decision se chall acquire that the cause was properly submitted to the jury. Even if the and the charged defendance with joing meglinears, yet the juny might find one defendant guilty and was neilly. Librais v. sares, 248 ill. 461; Covenant Clab of Chicago v. Throngson, EAV Ill. App. 128; Teals v. Lebon, 200 Ill. App. 200 (afficed Dan Ill. 600); I wil ou . T. w. Mine tundens do., 202 INT. Apr. Mac.

the jury so that it sight find either of defendants guilty or not guilty and if sounsel for plaintiff was without fault in the ten former yeality and if sounsel for plaintiff was without fault in the ten former of verdicts which were submitted, the sotion for a new trial was properly allowed, but counsel for defendant say that before the jury retired the resert discloses that defendant's counsel who was trying the case requested the court to submit additional forms of verdicts so that either of defendants signify be found guilty or not guilty but that that either of the error souplained of. Isuasel for plaintiff may take advantage of the error souplained of. Isuasel for plaintiff mays that west counsel for defendant requested additional forms of vertici, that mass counsel for defendant requested additional forms of vertici, jury had retired and therefore it was that this

The record discloses that after the jury was instructed and the two forms submitted, as above stated, the exhibits were gathered up for the jury to take with them, the court said: "all right. may retire, ledies and gentlemen. (The jury thereupon retired.) (Biscussion by Court and counsel off the record.) The Court: all right, make your point. Mr. Wright [counsel for defendant Building Corporation]: I want the record to show there are only two forms of verdict soing. I think there should be a form of verdict for each The Court: No. I think it is a joint suit. There should defendant. be a joint verdict. Mr. Merzon [plaintiff's counsel]: It is a joint suit. I agree with the Court, "" Hr. Wright: I object to the forus of verdict sent by the Court to the jury room with the jury, for the reason that it would be impossible to find one defendant only not guilty and the other defendant guilty. The Court: I think it should be a joint verdict. Mr. Wright: And I object to sending joint verdicts only. Mr. Mudnick (counsel for defendant Hypros): I object to the Court sending one type of Not Guilty verdict to the jury on the ground that it is not in harmony with the instructions given by the Court, which pertain in some instances to each defendant separately, and also because it does not permit the jury to find one of the defendants not guilty. Ar. Wright: I join in that objection, too.

The jury returned their verdict on the same day, April 55, 1940, finding defendants not guilty. Afterward counsel for plaintiff filed a motion for a new trial epecifying, among other grounds, that the court erred in submitting the two forms of verdict. The motion was overruled July 1, 1940, and on the next day plaintiff moved to set aside this order. The matter was heard July 8, the motion for new trial sustained, and this appeal followed.

On the rehearing, July 8, of plaintiff's setion for a new trial counsel for the Building Corporation called the court's attention

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The record discloses that after the jury was instructed and the two forms authorised, as above crack Air exhibits were actioned up for the jury to take with them, the court said: "All right. fou may rottro, latter and gootlemen. (the jury therespon rottred.) (Miscensian by Court and country off the recent.) The Mounts there, make your pound. for extent [county for introduct for the To careft out the our scout well of broom off them I : [noiserous] versiot going. I think there chevid be a few of version for each Ligoda oradi . Vice injet a si il inidi I .el iTruel odi . Jackarleb be a joint wordist. At Margon [Listiff's source]; It to a joint sait. I agree with the Court. "" ar. . right: I object to the forms of teat and the for the classic and in the time to the teat to year the state and the first to this one and along the state or year tipon of the other to be apply the many the said has pilled on a joint variator. It while had I chiese to centing joing revolution ouly. Mr. Manick [councel for defendent Mygrou]: I object to the Annorm est no west est of father willing for to east one tailson true? that it is not in hermony with the instructions given by the Court, which pertain in come instances to each defendant separately, and also som esmalmereb edd to one bait of grad add siming don cook il comeand gullty. Hr. Wright: I join in the objection, tec. *

The jury returned their verties on the tune day, April 25, 1940, finding defendants not guilty. Atterment counsel for plaintiff filed a metion for a now trial specifying, among other grounds, that the sourt erred in submitting the two force of verdict. The motion was overruled duly 1, 1940, and on the next day plaintiff moved to set caide this creer. The motion was beard July 3, the nexton for new trial section of this appeal followed.

the the rehearing, July 5, of plaintiff's motion for a new brish counsel for the Smilding Corporation called the court's attent. to the fact that he had objected to only two forms of verdict being submitted to the jury and suggested others, but that counsel for plaintiff said: "No, the forms of verdict are proper." Counsel for plaintiff them said that the court, after instructing the jury "unbeknown to all counsel in the case, submitted two forms of verdict "" Immediately following this submission of these two verdicts or these two forms of verdict, the Court instructed the jury to select a foreman and retire to proceed with the consideration of the case.

"Just at that moment counsel for defendant objected to the forms of verdict, and there was discussion between the Court and souncel, in which discussion I have also joined as counsel for plaintiff, and I suggested to the Court that it is a joint suit.

"About that time, if your Honor please, the Jurore were rising, and while this discussion was going on the Jurors retired to their Jury room."

From the foregoing we think that the failure to submit the additional forms of verdict to the jury was brought about, in part, by counsel for plaintiff before the jury retired but even if the jury had just retired, it would not have been too late to submit the other forms, before a consideration of the case was begun by the jury.

Since the verdict returned was against plaintiff we think, under the circumstances, she ought not now be permitted to contend that other forms of verdict should have been submitted to the jury.

For the reasons stated, the order of the uperior court of Cook county awarding a new trial is reversed and the matter remanded to the trial court with directions to enter judgment on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, J., and McSurely, J., concur.

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to the fact that he had capaced to only him form of nertice being evimited to the jury and suggested others, but the counsel for plainties the fact that the counsel for plainties the case the case of the fact the case of restlet entrances of all counsel in the case, exhibited to force of resilet entrances of the case of the septict of the fact of the case of the septict of the fact that forms of the septict of the case of the case.

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William of Oak Aak, IL-Roll,
a Municipal Corporation,
Appelles,
CRIMINAL COUNTY,
COOK COUNTY,

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

vas found fullty of violating the coning ordinance of the village of Cal Park and fined 125; she appealed to the Criminal Court, where upon trial by the court she was again found guilty and fined 125; she appeals to this court.

Dection 929 of the soming ordinance divides was Park into four use districts. Section 930 defines hesidence District "A" as persitting, among other things, "Dwellings, provided also that such dwellings shall be arranged and designed for the exclusive use of only one family." Defendant, who lived in a one family dwelling in District A, at 1085 superior street, Cak Park, was charged with violating the ordinance by using another building at the rear of the premises as a three family dwelling.

The entire coming ordinance, passed in 1921, was placed in evidence. Sub-paragraph 45, section 35.09, Article 11 defines a non-conforming building or use as one that does not conform with the regulations of the use district in which it is situated. Section 9.4, dealing with non-conforming uses, provides:

"The lawful use existing at the time that this ordinance takes effect of a building or precises may be continued, although such use does not conform with the provisions hereof.

"Any building existing at the time that this ordinance takes effect, arranged or designed, or at that time devoted to a non-conforming use, may be reconstructed or structurally altered, provided such structural alterations shall cost an amount not to exceed fifty (50) per cent of the value of the building, and provided also that the

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MR. JUNIOR MODE FLY . LLY E.D SMC GAT LLY . The Same.

estendant, in a jury trial before a dustion of the fears, was found guilty of violating the estimate of the ville a set that fand 185; the appealed to the dutained lead, cheek also trial by the court one was again found guilty and three of the court.

Section 900 of the median endiances living and the land four ter districts. Section 530 indiance districts the aspective and feducal land, required the tends of the confidence of the tends of the confidence of the tends of the confidence of the time and the end of the confidence of the lating the ordinance by using another building at the great of the profiles as a three family deciding.

The entire coming ordinance, aread in 1761, was placed in evidence of the extrapolation of the conforming building or use as one that there are conformations of the use of the conforming uses, provides:

"The lawful use existing at the time that this orthonian white culting or promises may be continued, at such use does not conform with the provisions hereof.

building shall not be enlarged unless the use thereof is changed to a conforming use.

"A non-conforming use may be changed to a use that is permitted "" The use of a building or premises shall not be decard to have changed because of a temporary vacancy or change of ownership or tenancy, however, the suspension of a non-conforming use shall not be resumed after a period of conforming use."

The present complaint was filed some time after plaintiff had granted a permit to defendant for alterations to the rear building and after the work was completed. It was contended by plaintiff that at the time the zening ordinance was passed in 1921, the rear building was used for the occupancy of but a single family, whereas defendant, after the alterations, was unlawfully using it as a three family dwelling.

the ordinance was passed; that it was then and ever since occupied by more than one family; that the village acknowledged the building to be non-conforming, as, when application for alteration to the building was made by defendant, shortly after she purchased it in August, 1938, the permit was issued for an alteration to a non-conforming residence, not to exceed 50 per cent of the value, and the village through its inspectors knew of this during the alterations and approved of them almost a year before the complaint was filed.

be are of the opinion defendant has failed to support her position with any convincing evidence that the rear building was, at the time the ordinance was passed and ever since, occupied by more than one family. On the other hand, plaintiff's evidence supports its contention of a single family occupancy at the time the ordinance was passed and ever since, until the permit for alterations was granted.

The only testimony for defendant in support of her centertion that the rear building was occupied by two families at the time the zoning ordinance was enacted in 1921, was that of a Tr. Feal. He testified that he had lived in the neighborhood and had been acquainted with the presises about 75 years - back to 1916 or 1917; that he know

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The present completed for ellerations to the plantiff had greated a permit to defendant for ellerations to the rear smitting and effect the very see completed. It was contended by plantiff that the time the scales criticance and permit to 1973, the rear building was used for the occurancy of but a clock family, shares defendant, after the alterations, was unlawfully using it as a three family.

Defendant contends the very believe as according then the ordinates of the ordinance was peaced; then it was then and ever since acquied by more than one family; that the village actes ledges the beliefung to be new-conforming, as, then equilication for therestay to the balifies was made by defendant, shortly after the purchased it in outast, 1978, the paratt was hand for an alteration to a nex-conforming residence, not to exceed the village through its interpeators knew of this during the alterations and approved of them almost a year before the complaint as alternations and approved of them.

e are of the opinion defendant has laited to majort her and the continue of the other land, pleintiff a evidence supports its contention of a single featly occupancy as the time the ordinance was

the scaley endinance was seasted in 1921, was that of a Sy. Penl. Se testified that he had lived in the neighborhood and had heen sequainted to premises about 25 years - hask to 1916 or 1517; that he knew the occupancy of the building on the rear end of the lot during all those years; that he delivered greeeries for several firms and made deliveries to people in that building. Counsel for defendant then asked, not with respect to any particular time, if he knew the names of the people who lived there, "the two families who lived in the building?" To which he replied, "No, I did not, no, no, I don't remember the names." This was the only question partaining to a "two family" occupancy asked of this witness, although he said he was acquainted with the occupancy of the building during all those years.

when the building alterations were being made in 1938, he was employed by the contractor who did the work for defendant; he did not know whether at that time one or two families lived there. Although this witness testified he lived in the neighborhood, he did not give an address or his period of residence there.

perendant testified that at the time she bought the presises in August, 1938, there were two families living in the rear building, one upstairs and one downstairs, and that shortly afterward the people downstairs moved; that at the time this complaint was filed "there were three individual units living there then."

Buth Rankin, a real estate agent, testified for defendant that over a period of four months before she sold the property to defendant the building was occupied by two families.

Charles Van Eirk, who has lived in the house west of the defendant's property since 1924, testified for plaintiff that one person occupied the rear house for several years, followed by a married couple - afterward another married couple.

Wrs. Vasey, whose daughter in 1936, was looking for an apartment, testified for plaintiff that in this building there was just one room upstairs, over a two car garage.

Defendant testified that when she purchased the premises she began to clean, repair and fix up the premises and went to the Village Hall and get the permit for alteration; that she had a con-

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the occupancy of the building on the rear and of the lot during all love years; that he delivered graceries for several figure and made deliveries to yearle in that building. francel for defection first asked, not with respect to any particular that, if he has the name of the people who lived there, "the two families was lived in the building?" To which he replied, "to, I did not, no, no, I don't remarkable the mass." This was the only exection perfectable to a "two sealing" occupancy asked of this witness, alternate he said to sea acquainted with the evenyancy of the witness, alternate he said to sea

when the building alterations were being sear in 1818, he was employed by the contractor who did the work for defendant; he did not know whether at that time one or two families lived there, Although this witness testified he lived to the neighbord, he did not give an address or his period of recitence there.

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Muth benkin, a real estate agent, testified for defending that over a period of four months before she cald the property to defendant the building was escupied by two fending.

Charles Van Kirk, who has lived in the house west of the defoudant's property since 1924, testified for plaintist that one person occupied the rear house for several years, followed by a married couple - afterward another married couple.

Mrs. Vacor, whose daughter in 1958, one looking for an apartment, testified for plaintiff that in this building there was just one room upstairs, over a two car garage.

she began to clean, repair and fix up the premises and cant to the

versation with Wr. valls, the building commissioner, who told her the permit was issued for a building that was put to a non-conforming use, but he did not say anything about the use of the premises by one family only, or how many families might occupy it. The alteration called for five or six electrical fixtures and outlets in each room, five plumbing fixtures, a gas hot water heating system with six radiators, and a rear stairway to the second floor.

ar. Walls, testified that defendant came to his office and asked what was delaying the alteration permit; he explained there was some question as to the use she intended for the property; that his inspectors had told him she wanted to make a studio on the second floor west; it appeared to him from the application for plumbing fixtures on the second floor, where there were existing plumbing fixtures for the family that was living there, that there was going to be more then one family using the premises, and if that was the intention it would be a violation of the zoning ordinance. He said defendant informed his that she had no intention of violating the ordinance; she wanted to make a studio out of the second floor west in order to carry on her work in music, and also to provide better facilities for the family occupying the place at the east. The commissioner, after hearing defendant's explanation of the use she intended for the property, saw no objection to issuing the permit, which was deted October 25, 1938.

Wr. wilcox, a plumbing inspector, had several conversations with defendant, and in one of these, after the permit was issued, she said she thought of finishing off the interior of the second floor west into a room she might use as a studio, and asked if that would be allowed, and was told by him that if she was going to use it hereself it would be all right to use it as a studio only; that he later went to her house and asked if she was finishing off this quarter on the west as an apartment and she said she was not. We explained that

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veraction with ir. walls, the building evanishment, who wall ber the permit was insued for a building that was put to a new-conforming use, but he did not may entiting about the use of the grantom by one family only, or how many families which excupy it. The alteration called for five or six electrical firmance and switches in seek room, wallstore, and a rear electrical firmance and southers in seek room,

Fr. -alla, testified that defendant need to his afrien and and every houldhard on this agent and the out pully like one don't hades and the state of the the see also for the for the survey of the state of conservation of the electron of leading one all blot bed profoequal -ail galdenia on the control of his from the application for plumbing fire tures on the second floor, whire there were suitting planking finteres for the family that was laving there, that there and going to be more then one facily acts, the prostres, and if the es the detection it ent Instante him a and in galage of the religion of the come the that she had no intention of visitation the saint and bomes's regres of general second control with the collect a mine of heiser on her work in marie, and also to provide intto shadilities for the Esmily cocupying the place at the east. The countricioner, after poly not beheated the and the neitheralque of transcrib guinace proporty, can no objection to ismuing the potent, which was dated October 25, 1936.

If allow, a plumbing inspector, had noveral conversations with defendant, and in one of these, after the permit we issued, she said the thought of finishing off the invertor of the second floor west into a room she might use as a studio, sad saked if that nould be allowed, and was told by his that it she was going to use it here sail is would be all right to use it as a studio only; that he later sont to her house and saked if she was finishing off this quarter on the west as as not. He explained that

It would be a violation to allow anybody else to live in the building. The then said that when she bought the building the realter said she would be allowed to finish off some rooms and rent them as living quarters in the rear, and she figured on that at the time she bought the house and did not know how she was going to make payments for the house or make ends meet unless she did.

several days after the application for the permit was made, at which time one tenant lived on the east side of the second floor and the rest of the building was unoccupied - the ground floor was fitted for but not at that time used as a garage. He later made numerous inspections, the last in october, 1939, when the first floor east was used as a boiler room and for storage space, the second floor east used by the same tenant as before, and the upstairs and downstairs on the west occupied by two separate tenants.

From the first floor to the second was a stairway inside the building; from the first floor to the second was a stairway inside the building; it then housed three separate families, with the east lower floor used for storage. Defendant at that time told him she had the same parties living there as were there previous to the time when she bought the property, but since then had made two additional rooms. The witness next inspected the premises in September, 1839, and told defendant that in the opinion of the village she was violating the ordinance, and unless she restored the building to its original statue as being occupied by only one family, the village would procedute.

There is nothing in the testimony of defendant or of the building commissioner, Halls, or of any other witness, nor in the actions of any of the inspectors, to indicate that plaintiff, through its agents, acknowledged the building as non-conforming for sore than a single family occupancy and approved of the alterations for any different use.

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it would be a violation to ellow enyhely eine to live in the building.

The then seld that when she bought the building the realter seld eing would be allowed to finish off come rowe and reat the finish of finish of the reat, and the figured on that at the time also bought the bouse and did not know how she to make payments for the house or make ands seet univer the city.

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premises in June, 1973; through the center of the building leading from the first floor to the second was a stairmy lastde the building; from housed three separate frailiter, with the sect lower floor used for storage, refeathant at that time told him she had the seam parties and property, but since then had and two additional rooms. The electron next inspected the premises in September, 1638, and told defendent that in the epision of the village she was violating the ordinance, and un-

There is nothing in the testiment of defendant or of the building commissioner, walls, or of eng other witness, nor in the actions of emy of the inspectors, to indicate that plaintiff, through

It is argued that the inspectors of the village supervised the repair work as it was done under the permit in question and must have known of defendant's intentions with respect to the alterations by reason of the quantity of supplies ordered and, in effect, defendant therefore should be relieved upon the theory of an estoppel.

To reference is made to any evidence whereby it could be said that the inspectors were given any reason to believe the repairs and alterations were being made for the use of any more than one family in the building. Defendant assured the inspectors that she had no intention of violating the ordinance. This also was her reply at the time her permits were secured, when she was informed by the building commissioner that an extension of the single family use would be a violation of the zoning ordinance as it applied to the non-conforming building.

as we have already said, defendant has failed to support her position that the rear building was, at the time the ordinance was passed, and ever since, occupied by more than one family. It is not unreasonable to believe, according to the testimony of the plumbing inspector, sileox, that defendant unfortunately had relied upon the advice of the realtor at the time she purchased the premises, namely, that she would be permitted to finish off some rooms in the rear building and rent them as living quarters. It was not until some time afterward that she made application to the village authorities for a permit and was informed of the zoning regulations.

her to testify as to the character of other buildings in the same block and to show that certain alleged orders and directions would result in unfair discrimination to her without any corresponding benefit to the public, and cites Merrill v. City of Wheaton, 356 Ill. 457. That case was an injunction suit brought to restrain the city from interfering with the remodeling of a building intended to change it from a single family to a two family dwelling, and attacked the

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It is argued that the instructors of the village enterprised the repuls with me it was done under the seculi in succession and some two known of defendant's incentions with secure to the alterations by reason of the quantity of supplies arists! we, in affect, defendant.

is inference is made to any evilence concrete it sould be cald that the interders were given any rearts that the interders were given any rearts and alternized were being under few the sets of any were than one on intention of violating the ordinance. This shap was set reply at the time her paralle were secured, when six wes informed by the fine her paralle were secured, when six we informed by the falling commissions that an extension of the sixtic or the next any ordinance or it surites or the next.

As we have already sold, defendant out failed to cappare her position that the rear muliding was, at the time the or larges was passed, and ever slave, becaused by more than one finity. It is not unreasonable to helieve, according to the destinant of the plumbing inspector, wilcom, that delendant unfortunately had relied upon the advice of the realter at the time the paraboral the province, namely, that the remitted to finish off some course in the rear building and reat than actionists one time afterward that she made application to the villess actionists for permit and was informated to the populations.

ner to testify as to the character of other bulldings in the constant block and the attent of the character perints alleged orders and directions votion to been at the attent of the corresponding to the case was an injunction suit brought to restrain the city of the candeling of a building intended to allege the called the character to allege the called the called the called the character to a tracked to

validity of section 3 of the soning ordinance which formade the erection in sertain territory of any buildings except single family dwellings and boarding houses limited to sixteen boarders. The court held, under the circumstances of that case, that section 3 of the ordinance was discriminatory and unressonable in prohibiting a two family residence but paraitting boarding or rooming houses with a large number of persons. This case is not in point, as it involved the validity of an ordinance. In the instant case defendant has not questioned the validity of any part of the zoning ordinance; here involved was the enforcement of an ordinance, not its validity, and the exclusion of evidence as to other buildings was proper.

Defendant's principal claim to error is that the trial court disregarded what she believed to be the preponderance of the evidence. We hold that the violation of the ordinance by defendant is the respect referred to, and as charged in plaintiff's complaint, was proved by a clear preponderance of the evidence, as is required in cases of this kind. Gity of Chicago v. Marrett off. Co., 192 Ill. App. (abst.) 460; Gity of Chicago v. Move, 187 Ill. App. (abst.) 178, and cases there cited.

Noreover, defendant claimed as part of her defense that the rear building was, at the time the ordinance was passed and ever since, occupied by more than one family. The asked the court to base a finding thereon in her favor. The then had the burden of furnishing the evidence upon which such a finding could legally rect. Frantice v. Grane, 234 Ill. 302, 309. "Where defendant pleads an affirmative defense he has the burden of maintaining such defense by a preponderance of the evidence." MacMell, Illinois avidence, (24 ed.) 474, and cases there cited. Defendant failed to maintain her defense in this respect.

The judgment of the Criminal court of Jook county is affirmed.

JUDGMENT APPIRABLE.

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disregarded what she lelieved to be the created to the veial court disregarded what she lelieved to be the created; some of the evidence. We hold that the violaties of the ordinates of the createst in the proved by a clear preparation of the evidence, as is related in proved by a clear preparation of the evidence, as is related in case.) 480; diry of Chicaro v. towas, 187 lik. tep. (also.) 178, and cases there there ofted.

Norcever, defendant claimed as cart of her devense that the rear building was, et the time the ordinarce set passed and ever since, ecoupied by more than one family. The time had the court to bars a finding thereon in her favor. The time had the burden of fermiohing the evidence upon which such a finding could legally rest. Irrailar v. the evidence upon which such a finding could legally rest. Irrailar v. Crene. 134 III. TOT, 300. "Shere defender pleads an affirmative defense he has the burden of maintaining such defense by a preponderman of the evidence." Hackell, Illinois Syldense, (In ed.) 474, and cases there eited. Folendant falled to salatain her defense in this reteract.

The judgment of the Criminal court of Cook county is millional.

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STELLA STRASSESSED and M. LEWIS, Appelleds,

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LANDCAN, MUTCHTAND & CO., A. O. TROWF and C. J. TROW, Copartners,

Appellants.

UNICIPAL SOURT OF STRICAR

KIL JULYICK HE WALLY DELIVER D THE OFFSION OF THE COURT.

Plaintiffs brought suit alleging that defendants, who were brokers on the Chicago Board of Trade, failed to notify plaintiff #.

Lewis of a change in the market price of corn as defendants had promised to do; that by reason of this plaintiffs suffered a loss which they sought to recover from defendants. Upon trial by the court judgment was entered against defendants for 799.40, from which they appeal.

Plaintiff Lewis had had Scalings with defendants through Henry white, their customer's man, and subsequently introduced are. Stella Strassberg, the other plaintiff, to white; she desired to open a trading account but was told by white that the rules of his firm did not permit trading accounts with women, so it was agreed that Frs. Strassberg would make her investments through Lewis, and all of the transactions were between Lewis and White.

laintiffs assert that white promised to notify leafs if there was any change in the market of "1/8 of a cent, more or less," and that August 2, 1937, there was a fluctuation in the core market of 4 and 1/8 cents a bushel; that defendants did not notify plaintiffs of this, with the resulting loss. This denies making such a preside.

In the fall of 1935, Lewis was solicited by white to transfer his stock account to defendant Lamborn, Nutchings J Ca., and Lewis signed a card whereby he agreed to be bound by all the rules and regulations of the Unicago Board of Trade. One of these rules forbedo brokers to give continuous market quotations over telephone wires. ATTOC.

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Figure Corrections but had but dealings with interiors through from the street of the other picture, to utual she dealed to open a trading account but was told by white the the criter of his firm did not permit trading accounts with momen, so it was agreed that from trading accounts with momen, so it was agreed that from transactions were between send with.

Plaintiffs camers that mile procioed to notify levic of case," change is the number of "1/2 of a cant, mape or ters," and that August 2, 1937, there was a fluctuation in the corn market of 4 and 1/8 cente a buckel; that defendants sin not notify plaintiffs of

In the full of 1938, lowie was eclieited by White to transfulls atook account to isloadant lembers, Sutchings a So., and Lowis whereby he agreed to be bound by all the rules and the the Chicago Scard of Trade. The of these rules forbate actions of lewis in the grain market through Lamborn, Butchings & Jo.
Commencing in April, 1837, there were six of such transactions, all
of which showed a profit to lewis. During all of these transactions
white kept lewis informed as to the market conditions. In August,
1937, Lewis instructed white to sell 20,000 bushels of leptamber corn
and to buy an equal amount of December corn. This is called a
"spread" on the Board of Trade. August 2, the corn market fluctuated,
and white instructed his telephone operator to call Lewis at about
11:15 e'clock in the morning, but the operator reported that one could
not get a call through; that she would receive the busy signal;
eventually she reached Lewis' office and was told by his operator that
he was out; word was left for Lewis to call white, but white heard
nothing from Lewis' office all that day.

All of the corn trades made by Lewis were on margin and Lewis had stocks pledged with defendants to secure the grain orders. On the morning of August 3, white called Lewis to tell him he must put up more collateral, since the "spread" had moved against him. Lewis declined to put up more collateral and his stocks were sold to cover the loss.

believe white promised to notify Lewis of every 1/8 of a cent price change. Accords were introduced showing that on August 2 there were about 350 separate 1/8 of a cent price fluctuations in September corn and about 250 price fluctuations in December corn. In order to inferm Lewis of every change of 1/8 of a cent on this date it would have required white to notify Lewis approximately 350 times. Someover, there is no claim that white, in the prior transactions with Lewis, notified him of changes of 1/8 of a cent in the market price. There are various other considerations which negative any undertaking by hits to notify Lewis of any change of 1/8 of a cent in the market.

There is in the recent threath interest instant, interior a formations of levic in the grein narbet through instant, interior all commencing in April, 1987, there were can of out transactions, all of which should a profit to levic. Levic all of these transaction of which instructed that to rell in, and to antitions. In Lance to make, 1887, Levis instructed that to rell in, and instructed that to rell in, and instructed the telephone operator to all terms as short and to buy an erual angula of hereafter torn, this is suited a short and thits alless a little o'clock in the morning, but the approximation repeates the previous that and the second eventually she rescaled tends of the month of the morning from tends of the total and that and all that the rescaled tends. That was cost; and not total and costs that the cast in the month of the tends to call white, but enter hears.

All of the core trades made by camis care on entries and
in the morning of August 3, white called leads to tail his he wast
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Defendants angue effectively that it was naveleousle to believe thite premised to motify tents of every 1/8 of a cent price about 200 caparate 1/8 of a cent price fluotuations in the tenter porn and about 200 price fluotuations in Secondary care. In order to inform levie of every change of 1/8 of a cent on this date it resid have rete no claim that thite, in the prior transactions with levie, motified to no claim that third, in the prior transactions with levie, motified to no claim other considerations which megative any undertaking by this

PARTIES AND ALL TANK A TO BY THE SUPPLY THE REPORT OF REPORT OF THE PARTIES.

In plaintiffs' brief they admit that white did not promise to notify levis of any change of 1/8 of a cent in price, but say he promised to notify Levis of "any changes 1/8 of a cent, more or less," and the argument is made that the words "more or less" meant a promise to notify Levis of the fluctuations of more than one-eighth. In their statement of claim plaintiffs asserted that defendants agreed to notify them "as often as the market fluctuated at least 1/8 of one cent," so long as the "spread" was in excess of 25 points. The trial court based its finding upon the conclusion that defendants did not give notice that the fluctuation was exceeding 1/8 of one cent. The julgment entered of 1799.40 was the amount of plaintiffs' loss, less 1/8 of a cent per bushel, and this can only be explained upon the theory that Lewis should have been notified as soon as the "spread" price had fallen off 1/8 of a cent.

There is also force in defendants' argument that while the evidence shows white endeavored, unsuccessfully, to reach Lewis by telephone when the price had changed substantially, the court dieregarded this testimony because it was of the opinion white should have called Lewis the moment of a 1/0 of a cent fluctuation. In other words, the court adopted the theory of plaintiffs that white had promised to notify Lewis the moment there was any change of 1/0 of one cent. As we have indicated, we hold this theory is unreasonable and cannot be given credit.

Plaintiff's make some argument that the transaction was a gambling transaction, and say that under the Funicipal court practice no pleadings are necessary in fourth class cases in the Funicipal court. Funicipal court rule 5, par. 1 (1935), requires plaintiff to file a statement of claim setting forth the facts of his emphaint. There is no claim made in the instant statement of claim that this was a gambling transaction. The judgment was not entered upon this theory.

ment entered and it is reversed.

O'Connor, P.J., and Matchett, J., concur.

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Plaintiff wells some organism that the transaction are a gambling bransaction, and say sint maker the kontelpal court praction to ploadings are necessary in fourth class cause in the hadelpal court rule 2, par. 1 (1908), requires plaintiff to file a statement of claim softing forth the facts of his complaint. There is no claim sode in the instant statement of claim that this sage are daily framewhich.

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41367

CHEFRA CALZAVARA, FRANK CALZAVARA, her husband, and MHDO GALZAVARA,

Appellants,

CURTED, and Post I. Miller, Trustees of the Chicago, Ilwaukee, St. Faul and Facific hailrand Company, a Corporation, COOK COUNTY.

MR. JUSTICE MCBURELY DELIVERED THE OPINION OF THE COURT.

by them by the burning of a frame barn and its contents, alleging the fire was caused by the negligence of defendants in allowing dry grass and weeds to be upon the right of way of the railroad operated by them as trustees, which was set on fire from a locomotive engine, and also in failing to keep their locomotive engine and trains in suitable order and repair so that fire would not escape and be thrown upon the right of way and property of adjoining land owners; that at 1:30 o'clock is the afternoon of Cetober 11, 1972, sparse from a locomotive engine passing upon the railroad set fire to the grass and meeds on the right of way, which fire spread and was communicated to the barn of plaintiff Cesira Calzavara, whereby it with its contents was wholly consumed.

The case was tried before a court and jury, and at the conclusion of the evidence for plaintiffs the court perceptorily instructed the jury to return a verdict of not guilty. Jud ment was entered and plaintiffs appeal.

It is well established that the trial court may not direct a finding for the defendant when there is evidence which fairly tends to support the plaintiff's case. If the evidence supporting the plaintiff is sufficient to make a grima facia case the court is not authorized to direct a verdict for defendant because of evidence of contrary facts tending toward an op osite conclusion. hancen v. Nightingale, 321, Ill. 168, 175.

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by them by the besting of a from here can be contents, which in the five was caused by the negliganes of defendance in allowing dry grass and weeds to be upon the signification of way at the solutions of correctly entities as them as them as the from a leader the content, and also in falling to been their leaders to be such to such the subhibite of an falling to been that fire you'd not expend out the isroin in subhibite fine and property of adjoining land events that at 1:30 of such in the effection of the original and the entitle entitle capture and consective engine passing when the relief fine to the grass and consider an engine passing when the relief the contents and wheelth consecuent.

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it is well established that the fail court any not direct a finding for the defendant when there is evidence which fairly tenent for a findintial is not plaintful is sufficient to sake a trime facts occe the court is not

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The evidence showed that the railroad tracks at the place in question ran in a vesterly direction on a down slope; the fence on the northerly side of the right of way was two or three feet south of the south side of the barn; dead grass and dry weeds from 1 to 1-1/2 feet high covered the slope of the northerly asbankment of the right of way and they had been there through the summer. The day was clear and dry and the wind was from the south.

the kitchen of the dwelling searby. The testified that she saw through the west kitchen window a locomotive going west along the railroad, drawing two coaches, passing the barn and emitting sparks; that a few minutes later she went outside and saw the couthwest side of the barn burning; that she called the fire department of the village of Libertyville, Ill. but before it arrived the barn and its contents were entirely burned; that she could see the grass and weeds starting to burn along the back of the barn on their property; that the sparks coming from the engine were as large as one's finger nail - "little red sparks flying from the south." The weather bureau report for that day was offered in evidence, showing that the maximum temperature was 83°, with an average of 72°; the maximum wind velocity 16 miles, with a momentary velocity of 24 miles - the prevailing direction from the south, and the sunshine 99 per cent.

chall be the duty of railreads to keep their right of way clear 'from all dead grass, dry weeds, or other dangerous combustible material, and for neglect shall be liable" in damages. Jaragraph 96 provides that in all actions against a railroad for the recovery of damages to property "occasioned by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full prime facis evidence to charge with negligence" a corporation or persons who shall be in the use or occupation of the railroad.

The evidence showed that the religions recons it was also in question was in a meteorly direction on a dam eleph) the fence on the northerly side of the right of way was two or three feet sauth of the nouth of the beauty dead green and day sauds from I to 1-1/2 feet high covered the alone of the northearly exemptants of the right of may and they had been thought the surrer. The cay was elear and dry and the wind was from the nearth.

The Ribbien of the seedling nearby. The resulties the see his circumb the Ribbien of the seedling nearby. The results the see his one see hisrough the west kidebox window a local star seeks; the religion drawing two encours, passing the harm and entries along the religions, since a law cashing two encours, passing the barm and entries laker also dern almost laker and colled the fire hisround of the village of hisrotypille, Ill. but before it argived the bern and its entrate ways entirely burned; that one could see the green and each areing to entries the seating to seption the seating to the colles for south and has they are the fire antimes and 20°, the weather first fire seating that the weather harms are seen as 20°, and the seating of 10° the menture with a seating the fire menture with alles, while a seating of the seating that the prevailing three from the seating of the menture view the seating of the seating of the seating the the prevailing three from the seating the the seating of the seating of the seating the seating the seating the seating of the seating the the seating of the seating the seating of the seating the seating the seating of the seating t

shall be the duty of relirends to test their right of ser clear 'from all dead grass, dry meeds, or other desperse combustible metarisl, and for neglect shall be liable 'in tempes. Jaraproph 95 provides that is all netions system a relirent for the recovery of demages to graphy "contained by fire communicated by any learnetive engine while upon or paraing along any relirent is this state, the fact that

doubtful as to some parts of the testimony of Nine Calvavara, but it was not for the court, upon the motion to direct the verdict, to weigh the evidence.

establish a prime facie case of negligence against the railroad company to introduce evidence tending to show that the fire was caused by sparks from the engine. S. S. S. S. S. L. My. Co. v. nornaby, 302 III.

138. In I. U. R. Co. v. Bailey, 222 III. 480, the evidence showed that from 10 to 30 minutes after a train had passed, fire was seen coming from the roof of a building nearby and the building was burned. The court held this evidence fairly tended to prove the fire was sufficient to make out a prime facie case, and the court therefore would not have been justified in directing a verdict for the defendant.

we are of the opinion that plaintiffs' evidence fairly tended to prove the fire was communicated to plaintiffs' barn from defendants' engine, and this was sufficient to make out a prima facts case under the statute. The trial court was not justified in instructing the jury to find against plaintiffs.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

O'Connor, P.J., and Matchett, J., concur.

done preasts and the trief nour fried that that the the up to the war of the latest to the latest the man rate of the first selection the solion to direct the verdion. In value

establish a prime factor case of negligance against the salled ecopous to introduce evidence tending to they that the fire one caused by aparks from the engine. O. C. C. E. i. fa. (a. v. forachy. 202 111.

From the 20 cinwick after a train bed mades, fire was seen assing from the your of a building marrhy and the sufficient see ware court held this evidence fairly tendence to the fire was seen as fire was another an authorised to the building two defendances of the seen and it was sufficient to cake one they are the seen as the

opinion that plaints? evidence (wirly tended

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LA SALLE HORTGAGE & DIDCOUNT COMPANY. e Corporation,

Appelled.

ALD BY JI MURAN. falliff,

THE TURNER THE POUNDERS COMPANY, & Corporation,

Appellant.

PEAL PHO MUNICIPAL COURT OF GAICAGO.

PR. JU TICE RATCHETT DELIVERED THE OPINION OF THE COURT.

January 9, 1939, the Turner company, defendent in this case, secured a judgment by confession for 12050.75, in the Municipal Court of Chicago, against william Schwartz, doing business at 655 . . ella street under the name of "lidwest Frinters "achinery works. same day an execution lesued to the bailiff and was levied on property at the above premises. Later the bailiff levied the execution on other machinery and equipment at \$20 %. 35th street. In each instance the Labelle Mortgage & Discount Company gave notice of the trial of right of property. The cases were tried together by the court. In each case, on January 27, 1936, the court entered judgment on a finding in favor of the Lawalle company and the Turner company appealed to this court. The records will be best understood if considered separately.

villiam chwarts, the judgment debtor, was engaged in the business of buying and selling secondhand printer's amelia ry. owned a business at 683 b. bells street and also at 200 . wells street. William Cohwartz has a brother named Corrie, who up to June 2, 1938, had not been engaged in any business on his own account. Vif and on he worked for his brother villiam. Bometimes he worked for the Turner company as a repair mechanic. He was paid from 10 cents to 90 cents an hour.

William Schwartz testified that about June 1, 1936, he (william) and offered a proposition to go into the moteh business. He AMERICAN AND ALLERS OF THE PROPERTY OF THE PRO

MS. DUPTION MANUFACTOR THOUTHAND FOR MELE TO THE COLLEGE

escated a judgment by confession for 1970, 75, in the initial tours of the mobinery and equipment at 200 b. Seek street. In the instance the Labella Mortgage a Discount Company park notice of the trial of right of property. The ocuse were tried teasures of the court. In cash case, on January 27, 1835, the court entered judgment on a finding in favor of the Labella court entered judgment on a finding in favor of the records will be been understood if considered to this court.

William Schwert, the justment debtor, was engaged in the owned a business at 653 %. Tells street and also at 250 %. Tells street. William schwerts has a brother named Survie, the up to June 2, 1936, had not been engaged in any business on his own necessit. William be worked for his brother William. Tennities he worked for his brother William. Tennities he worked for the Turner company as a repair mechanic. He was paid from 40 acuts to CO

William Wohnerto testified that about June 1, 1826, he [-111] was offered a proposition to yo have the match business. He

did not know whether he wanted it or not, so he suggested his brother Forris "take a crack at it. " We sold Forris "equipment to fit the nature of the business." He laid out for Forris the plans for the match company and the equipment he would need. Forris had never had any experience with that type of business. william prepared a conditional sales contract by which he sold to Morrie for .3500 certain equipment at 653 %. wells street. The instrument acknowledged the receipt by alliam chwarts of 1980 on the date of it (which was June 2. 1938) and the promise of Morris to pay to Billiam the balance of 2550 ten days thereafter. June 14, Morris, as the Midwest Match Company, executed a note for 3000 to the order of plaintiff, La alle company, and by chattel mortgage conveyed the property which he had purchased from his brother to it as security. The note provided for the payment of \$160 on that date, \$160 upon the leth day of each and every month thereafter for ten months, and the payment of 11240 on June 14, 1939, all with interest at 61, william chwarts, the judgment debtor, guaranteed the payment of this note.

his brother william owed him 1480 and that he (Morris) paid to william in the transaction 1500 in cash; that he then arranged with the Lavalle company for a loan. Wis brother took him to the loan company where he got a check for 12550, with which he paid off his brother for this property. Thereafter, he occupied the premises with his brother william. Morris says he was in the match business for about two months. He says he rented from his brother william at 126 per month. There was a front door and a back door to the premises. The entransacto the business conducted by william as the widwest Printers Machinery works was by the front door, while the entrance to the business of his brother Morris, doing business as the widwest Match Company, was by the back door. Morris says he sold very little in his business. He

and they whather he wanted it or not, or the caretain with the ods fit of famoglape pigge like of ". fi fe loste a edat" signed acture of the business. * Is init out for veril the vices for the had you had gired the sealer of faculty out has you need as any experience with that type of busteses, chilise property congiarras . 10 got alter at Alea ad deide yd destinos salat Escaldik equipment at 650 %, relle etreet. The introcent countries, se the res salms) of the state and see the stranger untilly of delager and 2, 1938) and the greater of Warris to pay he willish are belance of \$2000 ten days thursenfler, June 10, corrie, as the city of intub Company, exacuted a note for Juria to the motor of claiming, Lately Lad at dolor prespect and begover entrest totale of his trades purchased from his boother to it as security. ".. : note at eat for the payment of \$100 on thet date, \$100 spec tie 14th dap of each and pe Cell to face to the works, and the payers of the firm by law, on early tales of all the countries of the law Criston, guarantessa the paraent of this note.

North Schwerte, testifying as a mitsens for molenkant, seid his brother Millian oued him 1650 and that he florpit) join to will test in the transmostion 1600 in cash; that he tren arranged with the Land in the transmostion 1600 in cash; that he trend him to the lash contant where he got a check for \$2500, with which he reid off his brother for William. Norgio says he was in the cash business for about two williams. Norgio says he was in the cash to the premiors. The estudies to the fundament occalable by William that the Widest contained his wither was hy the front dear, while the entended to the business of his brother Morris, doing business as the Widest watch for cash of his brother Morris, doing business as the Widest watch for cash, was by brother Morris, doing business as the Widest watch for cash, was by

remembers one customer who paid him 120. He mailed out cost catalogues. He says his prother stilling agreed to help him. "I didn't have to may him. By duties were inside. I didn't go out." Worris says he might have done sure little jobs of repairing while he operated the match business. We didn't sign the lease at 330 %. ells street. brother signed that. He made only one payment of 160 and interest to the LaDalle company, in July, 1838, and did not pay anything after that. He never had a bank account in connection with his business, The sachinery sold there was sold by his brother. December 27, 1933. Morris turned the property purchased from his brother ever to the LaCalle company. This was about thirteen days before the entry of judgment and levy against william chearts. Morris chearts executed a bill of sale in consideration of his release from the chattel mortgage. On the same day the Laballa company made a written contract with william schwartz by which it suplayed him as its agent for "reasonable compensation for the services rendered by his in connection with the consumsation of such sales, and not otherwise, " The saresment provided that William chwarts was to hold any proceeds of sales as trustee for the company. The agreement was to continue in effect until the company should elect to terminate the same on rive days' notice. It provided villian Wehwartz should permit the La alle company to keep and store the property upon the precises known as 660 1. walls street, Chicago, rent free, for the purpose of exhibiting the same to prospective buyers. At the same time an employee of plaintiff La alla company went over to 655 %. sells street and with a stencil put on such piece of machinery a statement to the effect that it was owned by the Laballe Hortgage & Discount Company, Setween June 14, 1000, and December 27, 1938, William chwarts sold various items of property listed on plaintiff's mertgage with the beavisage and consent of plaintiff, and 1800 was received on these sales, turned over to plaintiff, and applied on the mortrage indebtaduese. In addition

remotions on the form of the size of the control one the control of the control of vac of even plable I' to rays ble brother dilless agrees to help its. dy duties were incide. I didn't to set. " France says be might moras and career as after galilager to adol alttil amor anob avail business. To dital to sign the leave of JTD .. . The signet. The brother signed test. He hade only one payment at 1207 and interest to the Lawelle correct, is boly, 1070, and fill out toy togething after that. ... u urrer has a beak appared to orm estime alle ... busines. The machinery rold there we sold by the brother, . earsher MY, 1800, cowis turned the property purchased from his brother over to the isballe communy. This was about thirteen days before the entry of between absorbed about a principal realities fratings went and passenglet issimic this are I considerated at his related to the to the on the same day the balalle corner was a misten puntruck of the chair of the employed bits of the chair for noissement al mid you have been an assisted our coursells of many of many alles, and not svienter. - size to alterroup que tied of the office of a company. The appendent on the continue is effect teng obreald close to be pointed the one on five days allical and threat thresh absorbe mility benipped it , eagling the proof of the case of the property and the president and the deme to prospective buyers. At the case time on explayer of plaintiff in the continue went over to dee . Della etreet and with a remoil and it that that's and as funnelate a gentlibem to apply done no the gener by the bardle during the blanch former, lebest the life his and leaves the armener subtities the entered has dillered in -nos bus spinivens out dila semprom afthinish as bedail : netiff, and clare were received on three cules, turned over and applied on the warepape indebteduesa.

a cach payment of 160 and laterest was made to plaintiff by Forris as already stated, in July, 1988.

.efendant contends the transactions between Worris Chwartz. willian tehwarts and plaintiff relative to this wells street property were fraudulent and void as to the creditors of villiam ...chwarts. says william Schwarts owned substantially all of the equipment listed in plaintiff's mortgage for a year or two prior to June 2. 1938, and on that date it represented practically all of his stock in trade; that Worris Schwartz was a repairman who had never had any experience in the match business nor steady employment, and that the instrument executed by these brothers was a conditional sales agreement payable in ten days; that a substantial part of the equipment contained in this sales agreement was of such nature that 1t could not possibly have been used in the alleged match business; that it was never moved from the presides on which it was located, and that William Bohwarts, who occupled the premises, continued to sell the equipment in the usual course of business; that the retention of possession and central of these goods by William Johnartz after he had apparently sold them was evidence of an intention on his part to defraud his creditors; that even the joint or concurrent possession with Morris Mchwartz was precumptively fraudulent. To this point is cited Muschle v. Morris, 131 111, 587, 591,

It is apparent the theory of the Turner company was that
Forris chwartz in the transaction in question was a mere dummy for
his brother william; that the LaSalle Vortgage & Discount Company knew
this and contrived with william and Forris Schwartz to the and that
the creditors of william Schwartz might be defrauded. Action the
evidence justified such an inference it is unnecessary to supress any
opinion for the reason that the trial as to this particular property
was not conducted fairly in the respects we shall now point out.

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offended, street remains constructed and stations factories vegeror, successful affire and of evaluated this intermedal smilliwere frenchient and fail to erollings or on him bus ins freither. bayelf francisco mil to ile qualificadedes been adqueste maillis ogen in plaintiff mortgage for a year or tee prior to done E. 1938, and en that date it represented procileally all of the cook in trade; that North Religions and a repolation and had never had the engineericate in the substitutes the charge consequent, and that the contract court to wet all alman announced a selection of the contract of the con enter alas al inclusion commilian and be dung Leistersalia a Salt lagab land need east plates of the blue to their state than the new function is the alleged match business that it was never ease from the premises on which it was leaded, and then billing action on Januar and all temperation of Land to market and the property and the property of the contract To Lordnon has nelusaseen to noiseeter wit tail transland to escure there goods by William Columnts after he had expensely selling them and said tractites of historia on his pay at as terrest the conditions; that see fire file sirror meressisses from the file and hove premumptively free inlant, To this point is eited Handhie v. Marris, let ill, nov, ool,

If is apparent the theory of the Jurner company was that Morris Tokeneths in the transaction in question and a may durage for his brother William; the Lafalle Workgage & Discount Jungery knew this and contrived with William and Workie Nobestt to the end that the creditors of william inherts night be defrauded. Mostner the evidence justified such as inference it is innecessary to express any opinion for the reason that the trial as to this jarticular property was not confucted fairly in the respects we shall now point out.

In the first place, the rules of the Municipal court designed to meet a situation such as existed were disregarded. Mule 130a provided for an examination of any "party" or "person" before trial.

**Cofendant filed a petition to that end and secured an order for such examination of millian and Morris Schwartz, an order which was quite appropriate under the circumstances. The trial judge, without notice to defendant and upon his own motion, struck his signature from the order. This was quite prejudicial to the Turner Type Tounders Company. Sule 246 (3) of the Municipal court provides that in trial of the right of property no written pleadings shall be required other than plaintiff's statement of claim, which in this case werely alleged plaintiff was the owner of the property. It is said that such examination was within the discretion of the trial judge. This may be true, but discretion should never be abused. The striking of this order was, we hold, an abuse of discretion. Defendants were entitled to this order.

second, Rule 137 of the Junicipal court provided in substance that the court at any time might order the production of any documents in the power or possession of any party relating to any matter in question in the action. Defendant gave notice to the opposite party to produce certain documents and plaintiff refused to produce the same. The court said they ought to agree on semething because defendant would want to see the books. The attorney for plaintiff said he would not produce them. Attorney for defendant sucgested there should be a contempt proceeding, or at least a continuance for which he made a motion. The court reserved its ruling, the judge stating that the only question in the trial was to show title. Attorney for defendant then pressed for a continuance and a bill of particulars, but the court said, "I don't see so much involved in this. All they have to prove is how they not title. Later in the trial defendant moved for an order on plaintiff to produce its books of account, and the court said, "Not yet." Attorney for defendant

In ten first, then the values of the vales of the vales of seed and another to meet a situation such as existed for an examination of any "large" or "large" before valed.

Selendant filed a polition of any "large" or "large an order of the mash selendant filed a polition and former or and an evoluted an order object one pulte existence of allian and former or the valed of all the state under the attractance. The valed is a value of the nation of defendant and upon his own wotion, should be to burner "lips the same fullence "lips can written plantation the functor "lips fundate foundary field of property as written plantation shall be resulted of the the plantation of the smallest of the same within the discretion of the trial pulse. This can exceed examination was within the discretion of the trial pulse. This said this easy to be the bold, an abuse of theoretion. To be shall not of this order was, we had, an abuse of theoretion. To be shall out a said this order was, we had, an abuse of theoretion. To be shall out a said this order was, we

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second, halo low the inniety at some gravited in entstunce that the court at any time might other the exchablen of any gas of sitefer pres to seems as to be in the tell of the form edf of coline even in their , solves out at solveoup at and at finance, thirstell him attempted Singles ambone of this; of Pages publifusion no excise of things part blas frome off Agreed will not set from Julius Controlled Streeted THE STREET, THE plaintif said he would not treduce thee, esterney for defendant sur--unitate about the to include transmine a select a state The court congress its ruling. sues for which he made a motion. effit works of one injusted at an energy of the cale and the calendary but to ilid a has sonsunitase a rot because good dasheateb ust your state particulars, but the court said, "I don't see so much involved in All they have to prove is how they ret title. " Later in the whold are nother as thinkely as order on the manufact to be and the training of resident to content ". set tul" . him raise and her . reserve to

then said, "I don't mean this winute. I mean, before the trial is ended." The court said, "I don't know. I may, and I may not." "r. "iscana: "If it is a question of title his testimony must either go to prove title or it is immaterial." The Court: "The best proof of title is the checks which you buy the article with. The canceled check is the best proof." Nr. Eiseman: "We are entitled to see their books and see what the entries are." The Court: "If I think you need them, I will bring them in."

It is apparent the court was proceeding on a wrong theory. Wanifestly, in a case such as is here disclosed, there could be no efficient cross-examination of witnesses in the absence of the books. The record shows that repeatedly upon cross-examination witnesses when pressed said the books would show the facts asked about.

In the next place, we think the court erred in restricting the scope of the cross-examination of witnesses. Morris and willise Chwartz were obviously hostile witnesses in so far as defendant was concerned. The defense was based on a charge of fraudulent transfer of property in which they were directly concerned. In such a case, wide and full examination and cross-examination should have been parmitted. 27 Corpus Juris, \$735, p. 804-806. Frequent remarks of the court when ruling on the evidence showed that the case was tried by the court on the theory that inquiry might not be made as to whether transactions by checks and written contracts were book fide. The court said: "All they have to prove is how they got title." "t another time. "The best proof of title is the checks which you buy the article with." Apparently, on this theory it was ruled that orris Schwartz might not be asked the source from which he obtained money to pay his brother on June 2, 1938, for the equipment which they testified was bought from william 'chwart: by 'orris .chwart: at that time; also, that his financial condition and ability might not be inquired into at length; that he eight not be asked about his arrange-

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then said, 'I don't ment this minure, I mesh, server the trial is ended. I lie court waid, 'I don't know. I may, and I amy not.' In. "issues: "If it is a question of title his restinguy wast citler; to prove title or it is a question of title his destine which proof of title is the chocks which you buy the article of the counciled check proof." Mr. Liesann: 'We are cutified to see that the entries are." The 'ourt: "If I think you need then, I will bring them in."

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ment with his brother as to the lease at 220 wells street; that the uselessness of equipment bought from william for the match business in which it was supposed to be used could not be shown; that the control of the wells street property by william chwartz after recomber 27, 1934, could not be inquired of upon the examination of Mr. Eleinman, plaintiff's manager with whom william schwartz dealt.

When it became apparent that Morris chearts was a hostile witness the court denied defendant's motion to make his the court's witness and permit full cross-examination on the ground Unst the motion should have been made before the examination of the witness began.

A night session of court was held and defendant asked a continuance which was devied. It is apparent the trial judge was in a hurry to get through, and that he sisapplied the rules applicable to the trial of causes in which the issues were of the kind involved here. For these reasons the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P.J., and McSurely, J., concur.

most with his brother as no the lease it the entis etter the extent the extent of the estate and repleted from this in the extent existent in wilder it was supposed to be used emile set to size if the the value of the training property by filling without after lease througher 27, 1276, could not be inquired at upon the examination of the Mainesa, plaintiff a manager with them this follows to deal to the manager with them this incomplete deal to

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A sight sension of neuric and held and helderlast chest and active one tinuance which was for a sinuance which has been appropried the trained place and that he missepplied the raises applied his first and the head of the hind largers and the hind largers and the head of the reverse of the training the reverse of the training that all the reverse of the training trainin

ACTOMICAL CONTROL

Planner, P.J., and Faderely, J., eenesr,

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firett e filotiki oft a Corporation,

Appellee.

HC-AN, ALDERT # Jailiff, or MINICAL COLLY

V.A. 548 OF THIS LUC-

THE TWEET TYPESTOUNDIES COMPANY, & Corporation, Absellant.

A THE PERSON

MR. JUSTICE MATCHETT BELIVERED THE OPINION OF THE GOURT.

Defendants appeal from a judgment entered January 27, 1030, in favor of the LaBalle company in an action of trial of the Fight of property situated at 820 s. 35th street in Chicago.

The facts in brief are that the Turner courany on January 9. 1939, obtained a judgment against villias "chwartz, who conducted a business in secondhand printing machinery at 653 . ells etreet, Chicago, under the name of Hidwest Frinters Kackinsry Gris. 1 -ecution issued on the judgment against Ichwartz in favor of the Turner company and was levied first on the property at 653 1. wells street. The Laballe company claimed the property and gave notice of trial of its rights. The execution was then levied on the property claimed to belong to the judgment creditor at \$20 . 35th street. The Labelle company claimed this property also. There was in each once Judgment in favor of the laballe Fortgage & Discount Company and appeal by defendant to this court. The appeal from the judgment as to the property at 653 %. wells street has been considered in an opinion filed this day in No. 40820. This appeal involves the property at 220 w. 35th street.

In this case the Laballe company gave evidence tending to show that Fr. Selig of the Matherson- elig Company sened a printing plant which was purchased by the 'a alle com any on betober is, 1000, for 11.386.86, and received from the vendor a bill of sale. On the

Polenkate appeal from a judgment covered assumpt \$7, 1970, 10 favor of the falle of the right of property situated at \$10 to 50 to abroat in cities;

The feets in brief are thek ter Junes congeny on Junusy Painulage out astronic callila inclara incompaga a haniate, 2001 , 4 a bustness in measurement priorities mentioned to the or the state of the state of .algo. Transilo- accessed Inochim to anno est cohor, ogacido gentul out le geval al citamum: facinge inomphat ed an housel notiue seems and man levied first on the property at the S. will street. to feits to onion over his granging eds heriefo granges officed ods the rights. The execution was then levied on the property claimed to effect off . Jeets atto . The is to their Jacobul eff of polec company claim of this supporty also, there are in each case the company yd Lesgya Ban ynngwed) touccell a cyngfre'i elfalai edf le newal ai defendant to this court. The appeal from the judgment on to the property at CES 2. bells elrest has been considered in an origin filled Till appeal iavolves the evenerty at USO w. this day in No. 40829. ATHERT ATTEC

In this case the Labelle company fure evidence tending to show that Fr. Selig of the Catherson-Celig Company owned a printing plant which was purchased by the Labelle company on Catober St., 1938, ease day the Latalle company resold this property to the judgment debtor, willies Schwartz, for \$18,585.21, executing and delivering to him a conditional sales agreement which provided that title was reserved in the Latalle company pending payment of the purchase price which was payable Hovember 28, 1938, with interest at 7%. William Schwartz sold some pieces of the property and in each case turned over the proceeds to the Latalle company. He defaulted in the payment due Hovember 28, whereupon the Latalle company took possession of the property and put tric Glantz, one of its employees, in possession as custodian. Glantz remained as custodian, both day and might, for three months. He was paid for his services by checks of the Latalle company, which also paid for electric lights, telephone, etc. Ulantz was acting as custodian for the Latalle company at the time of levy and at the time of the trial.

when the Laballe company first took possession, an auction sale was advertised in the name of the Midwest Frinters Machinery works. The sale was in charge of Br. winternitz, but the property was not sold. The custodian testified the judgment debtor, william Schwartz, came over at times to show customers the machinery; that sometimes he was there every day, sometimes twice a week; that he didn't take anything out of the building without permission from the Latelle company. The witness did not know what sales were made by William chearts but knew that he (the witness) had parmission many times from the Labelle company to take machinery out. He could not resember how many times william behwartz had been at the place nor remember the last time he saw him there. We did not remember who ther a cutting machine was moved out on December 8, but he remarkered outting machines were taken out and sold. He didn't know who ther chuartz showed these machines. The winternitz company was also selling machinery there.

Eleinan, general manager of the Labella commany, testified that after the termination of the conditional sales contract be told

anno day the istalle see, any recald this property to the juderest debter, willian behavisher, willian behavisher 12, 212. 21, execution and estaverion to served in the latelia company pending paganest of the property and in cash case varued over the precede to the property and in cash case varued over the precede to the levelle company, in defected in the payeout due property and put the distalle company took presention of the property and put the distalle company took presention as encoded. At was put the distalle company, which also paid for the services by cheuke of the Labelle company, which also paid for the Labelle company at the time of levy and at the time of the test the that the time of the trailed company at the time of levy and at the time of the trial and at the time of the trial.

then the Lalle sequency first took possession on suction greation" austria" thought soit to once wit at heristocke any slac Works. The sale was in charge of Pr. Hateralta, but the property was and like contact transled any leftifred deliberate new . Also For Sometry, came over at timed to also outremers the machinery; these dometimes he use there every day, sometimes twice a wash; that he Aids t take easting out to the initial without responding and that th ales every seles Jade west for his aparty add .ymageco ellated year noiselette bad (seestle edt) ad fadt wend the attachet maille times from the balls company to take machinery out. He could not you sawig not be need had granded mailled somit than wed reductive vehicle velocery for like at previa all you of sail, leaf all technology become and the S. reduced ac Suc Seven now and and find a cuffing maddines were taken out and sold. He didn't know whether sells now remains relievable will problems would become president salilar machinery there.

Michaela, general manager of the LeCalle company, testified

willian weavertx that if he had an opportunity to sell any of the machinery he (the witness) would make arrangements to sell him a piece, but he said he didn't think Schwartz cold any after Nevember 23.

November 29, 1938, Behwarts paid to the LaBalle company the sum of 1486.60, taking its receipt, and on Havember 30, he paid \$75.40.

The Turner company argues that the transaction by which the Laballe company took title to this property and sold it to illies cheartz was in effect a sertence as security for the soney advanced by the Laballe company for the purchase of the equipment, and that not being recorded it was void as to creditors under il of the Illinois Revised Statutes, ch. 95. This contention can not be sustained on the undisputed facts. The sale from "elig to the La alle company did not constitute a chattel mortgage because there was no debt from plaintiff to elig. Plaintiff paid elig for the plant and received an absolute bill of sale. The transaction between illiam chwarts, the judgment debtor, and the La alle company by which Schwartz became possessed of the property was a conditional sales agreement and not a mortgage. The transaction was in conformity with \$20 of the Uniform Bales act (Ill. Rev. Stats. ch. 1214) and the title of the Lamalle company prior to the time when the price was to be paid was superior to that of creditors. "liverthorne v. Chapean, "59 fil. App. 280; Horvitz v. Leibowitz, 274 Ill. App. 196. when the debt became due plaintiff took immediate and exclusive possession. In the absence of some conduct by which the Labelle company would be precluded, as provided by \$23 of the Uniform Sales act, its rights would be superior to those of any creditor who might levy. At the time of the levy and even up to the time of the trial the custodian of plaintiff was in possession of the goods. (See Unith-Yurd Ill. Anno. tats. ch. 131-1/2, \$20, p. 480, and \$23, p. 499.) Therer-Cillett Co. v. Long, 318 Ill. 432, 149 W. E. 925; Nat'l Bank of the Accubic of

William Schwartz that is no led an opposity to sell ony of the machinery be (the vivoers) would make arranessents to sell nin a piece, but he seld he dien't think Schwarts sold any after Herenber FG.

Navember 19, 1970, Johnsta paid to the la mile compay the case of the lating like receipt, and an inventor 30, he will 37.40.

The Furner assent argues that the transmit is inch the maillis of 11 him hem grangery with at offit deat tournes affatan Souther has the contract the figures of charge of the file of new affected. by the Lalalle company for the surpless of the exclusion, and their the out to it rebut eredibers of an hier age of befracer raise don Chinals Novierd Pascules, on, 25. This contraction can not be ourtained on the undiconted facts. The saie from "alig to the lating to the lating on how equif espaces equilyon latinds a similationes ten bib quarate debt from plaintiff to belig. Finingiff and belig for the the plant and maillis anested acidementation of a size to flid etaleade as bevious chewrete, the judgment debter, ent the induly course by which value Lancitione a can extended all to become a cannot attended direction of the contract of The transaction and in conformity with 120 of the Uniform Falce set (III, New, State, on, ISIA) and the Bille the La alla adapany prior to the time when the prior as as to be prid and meanting to that of oreditors, lilverthores, v. Thanks, 250 III. App. 202: Parvilla v. Leibovilla, 274 ill. Arg. 156. - Hos vin debt became due glaintiff took immediate and emolecty personaled. In the -rry of fileon trages affaint adv deide of Jeabaca once to enced blues stopic at f. an pulser waiters this are its rights sould be superior to those of any creditor who sight levy. At the time of the lary and even up to the time of the trial the enetodian of rlaintide was in prevented up the pools, (for helm-chart Ill, easy that, or at fall and and the property that the party and the sea of the to address our be much first state of the countries of the LESS and

Chicago v. elis-Jackson Corp., 358 Ill. 356, 193 E. E. 215; and West suburban Finance Usapagy v. Graham, 265 Ill. App. 587, 3 E. E. 2d 172.

as will appear from the opinion filed in No. 40805, the manner in which this case was tried is subject to criticism, but in so far as the property at 820 %. 55th street is concerned the rights of plaintiff are so clear that these errors could not in any way affect the merits of this suit, in which it is believed substantial justice was attained.

JUDGHENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

Unicesa v. 12312-Inches, Com., Man Mil. San, MAT a. . Mil: and Leeg Interfere Finance Compact v. arches, Min Mil. Sp., Fiv. S. . . . Sh 174.

As vill apover from the equinion riles in in, 1707-1, the manuar in which this case was tried to emister to emittable into the senance in a series of the prepart to the property at this is a senance of the senance of the series of the series of this thintities of this case was the series of this case was the series and the series of the

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O'Common, I.d., and Welarely, J., sensor.

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SITY MATIONAL MANN AND THUST COMPANY OF TVANNION, a Mational Sanking Corporation,

appellee,

HARRY P. PRANCHO, et al.

GIRCUIT COURT,

GOGE COUPTY.

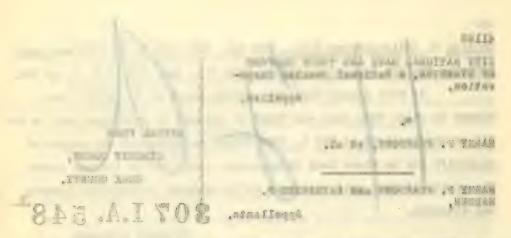
HANNY F. FRANCONS and KATHARINE T.

Appellants. 307 I.A. 548

MI. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order entered secember 11, 1939, in a creditor's suit directing that the proceeds of two purchase money mortgage notes held in escrew pending the suit, should be applied to the satisfaction of plaintiff's judgment. The cause was heard upon plaintiff's supplemental bill as amended, the answer of defendants and the reply of plaintiff upon the stipulation of the parties as to facts filed in the cause December 22, 1938, and evidence taken in open court. The facts are not in dispute. The recovery of the judgment, the return of the execution unsatisfied, etc., are admitted. The purchase soney mortgage notes were proceeds from the sale of a part of certain lands in Cook county, which on June 18, 1928, were comed in fee simple by Henry A. Fearsons, the father of the judgment debter. The title was registered under the Torrons law.

January 18, 1028, Menry A. Fearsons conveyed this land to the Commercial Trust and Savings Sank upon certain trusts declared in writing, of which the judgment debtor was beneficiary. August 4, 1531, by written direction of Henry A. Fearsons and Harry F. Fearsons, the bank by deed conveyed the land to defendant fatherine T. Madden, the at the same time executing and delivering this writing: "I, Latherine P. Hadden, declare that I hold title to the following described parcels of land, conveyed to be this day by Commercial Trust and Lavings Sank, as Trustee for the benefit of Marry F. Fearsons:



OR. JUNIOU BANGHUR BALLVARA CHARLES OF THE TARRY.

lefendants appeal from an order account la concher ll, life, in a creditor's sait directing that the proposed of the permisse money marigage noted held in score pending the sait, should be applied to the valishabiles of plaintiff's judgment. The cases see local upon plaintiff's supplemental bill as amended, the narmer of referdants and the reply of plaintiff upon the ettpulation of the parties as to feets filed in the cases becember 12, 1918, and evidence taken in open court. The facts are not in dispute. The recovery of the judgment, the return than of the essention unsatisfied, etc., are admitted. The purchase name of the sair of a part of certain nearly mortgage notes were proceede from the sair of a part of certain lands in the county, which on June 15, 1838, were comed in fee simple lands in the clark the fearth of the representation of the father of the judgment debtor. The title was registered under the forters law.

Canuary 18, 1828, Henry A. Pearmone conveyed this land to the Commercial Trust and Savings Bank won certain treets Auglared in by written direction of Henry L. Pearmone and Harry P. Pearmone, the bank by deed conveyed the land to defendant Katherine L. Hadden, whe at the sume time enecuting and delivering this writing: "I, inthurine P. Hadden, declare that I hald title to the following described year-acle of land, conveyed to me this day by Commercial Trust and savings acle of land, conveyed to me this day by Commercial Trust and savings acle of land, conveyed to me this day by Commercial Trust and savings as Trustee for the beautif of Harry P. Pearmonn:

writing describes the lands and is sworn to by katharine . Asiden before a notary public.

Plaintiff's judgment was for \$6,482.89. It was recovered luguet 13, 1935, in a suit on a note dated Warch 80, 1926. This suit was begun October 4, 1938, and notice of <u>lis pendens</u> filed in the office of the Registrar.

Attached to the etipulation of facts filed in the court December 22, 1828, are exhibits which are copies of the Instruments and conveyances above described. The stipulation of the parties consiets of nineteen paragraphs. No. 16 is as follows: "That the taken and held in substitution for the land therein described and sublect to the same trusts, claims and liabilities as said land was held prior to its conveyance, and that the above entitled cause proceed against said mortgages and the proceeds thereof, with the same force and effect as the came wight have been prosecuted squinst said land had title remained in Estherine . Endden as it was on the date of the filing of the above entitled cause. It is the intention of the parties that if the land described in the purchase money sortules was or could be subject to the lien of the plaintiff's judgment analyst Harry . Pearsons, or could be reached or subjected by Greditor's Complaint to the payment thereof, the purchase soney mortgages might be reached, sold or applied to the satisfaction of said judgment." The loth paragraph provides: "The Stipulation shall be filed in the above entitled cause and the recitations, terms, conditions and agreements contained herein shall be considered as part of the pleadings of the parties hereto and be conclusive upon the parties. "

Katharine P. Hadden is a cousin of Harry P. Pearsons, who during these transmetions was and new is a practicing lawyer. The evidence shows that since she took the title she has held it werely for the convenience of the judgment debtor; that the judgment debtor

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Plaintiff's judgment was for .5.400.60. It was recovered was begun a begun a because of the begun and solder at the security filed in the office of the depleteer.

frame all of halfs about to motted by the of badonsal beer boy Mr. 1935, are exhibits which are entire of the leavenurita and conveyances above described. The chi-sicales of the action regasiste of minetone negatives. To ld is no fellower " has the purchase money morninger in collection is enough to excluse to exclusive years -day bus badireas: aperair last ear for localizations at bird for world bind one land him we notificated and anima one and or foot prier de l'es senveyance, and vice vice above envirie acces arpesed egalust said mortgages and the process the coef, else the seas force ind test play remiers becovering mand even relate each as realty bus tivie remained in Karkarine ?. Undden as it on the days of the failing of the nices on its is to the intersion of the papers that if the land described in the purpless worse northern or could be embled to the lies of the plaintiff a judgment equinos darpy Forester, or model or reached by emigrouph of Declinar's Southfaller to the paymont thereof, the gurphane was ; work a for million be reaced, will not ". Inamint him to notical situa of balleys to him -ne syche and pd hally od time hadingield odth tackivory margara. sineway to bee ancidiance , would , encided out and asser beilth ed) to amplead; saf to year an berahingno of Hude airend benishes parties here to and be conclusive upon the parties."

Intercture?. Headen is a course of herry?. Increens, the daring times transactions was and now is a practicing longer. The evidence shows that since she wook the title she had beld it cerely for the convenience of the judgment debter; that the judgment debter

has received the proceeds of sales; that she has acted entirely at his direction, and it seems on plain equitable principles plaintiff is entitled to the relief prayed unless some controlling rule of law forbids.

serendante say those mortgages may not be applied to the judgment against Harry F. Fearsons because the writings by which the supposed trust in Matharine . Madden was created show the lask of clements necessary to the creation of a trust. They say the title, therefore, vested in Estherine ?. Wadden in her own right and that she holds clear of the claims of ereditors of the judgment debtor. To this point is cited Marble v. Marble, 304 Hll. 227-235; Lebora v. Rearick, 325 Ill. 529-537; Illinois, etc. v. Jones, 551 Ill. 498-506, and Curnett v. Mutual, etc., 356 Ill. 612. These cases do not sustain the proposition to which they are cited. In all of them questions are considered with reference to the existence of active trusts. All these cases hold that to create such a trust requires a definite subject matter, a definite beneficiary and a definite statement as to the nature and quantity of interest of the beneficiary, and the manner in which the trust is to be performed. These must be set forth with certainty.

declaration at the time she took title is sufficiently clear and definite in these respects. The land which is the subject matter of the trust is definitely described. The beneficiary is definitely massed. The duties of the trustes are clear and certain, which is merely to hold the title for the beneficiary. We hold the trust is not lacking in any of these respects. Manifestly, however, the trust created is a dry as distinguished from an active trust. The distinction is clearly pointed out in Barris v. Terruy, 207 fil. \$34,838, which has been followed in numerous cases. In substance, a dry trust is one in which, as here, the trustes is a sare passive depositary of

her recoived the processe of eales; that the pun soles entirely at his direction, and it seems on plain aquitable standiples plaintest to entitled to the relief prayed unless some ecotrality rule at law

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We hald the true created in teller and sufficiently clear and definite in these respects. The land which is the subject untiley of far the factories in these respects. The land which is the subject untiley of the truet is definitely described. The boundiciery is definitely assembled. The definition is named. The definitely described of the truets are clear and corpula, which is nextly to hold the title for the maneficiery. We hold the truet is not lacking in any of these propers. The distinct is created in a dey as distinction is clearly pointed out in tenrile v. Friggy, WOT III. SER, SUB, which has been followed in numerous cases. In coloring, a day truet in which has been followed in numerous cases. In colorings, a day truet the one in which, as here, the truetes is a sure passive layeritary of

the property without active inties. The cases all hold such a trust is executed by the statute of Wees so that nothing remains for the trustes to do but convey the property upon the request of the beneficiary. The trust undertaken by Matharine J. Madden, it will be remembered, states "I hold title """ as trustee for the benefit of Marry F. Fearsons """. This was clearly a dry or passive trust, the effect of which was to vest title in the beneficiary not the trustee. Tyler v. Tyler, 25 fil. App. 233; Moll v. Gardner, 214 fil. 248, 234-56.

It is next argued this property cannot be taken under creditor's bill by reason of the exception stated in \$40 of the Chancery act (Baith-Murd Anno. State., ch. 22, p. 264). This section in substance provides that a judgment creditor may by this proceeding reach any property, money or thing in action, etc., due to the debter "or held in trust for him," "" except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. " If we are correct in our conclusion that the trust created in Latharine . Hadden was a dry or passive trust this contention also is without merit. Holl v. Gardner, 214 Ill. 248. If, however, we assume, as defendants by their amended answer aver and by evidence offered notvithstanding their stipulation to the contrary to show, that the effect of the somveyance to Katharine P. Hadden was to create an active trust of the same kind and nature as was brought into existence by the original deed from Menry L. reareons to the Commercial Trust and Lavings Mank and the declaration of trust executed in consection the rewith, we are nevertheless convinced by our examination of these instruments that the trust created thereby is not exempted by this exception stated in this section of the Chancery act.

These instruments placed the title in the bank but gave to the judgment debtor (Harry F. Fearsons) the carnings, avails and proceeds of the real estate. He was given practically exclusive your

the property without resive duties, we are all bein man a reast to execute property with man a reast to execute of such as the contract of the contract of the such as the contract of the such as the such as the contract of the such as the such as the contract of the such as the contract of the such as the contract of the contract of

It is next engued this property course he wise solve or differ a bill by wearen of the enemption content is fit of the Chancery set (Inter-duct base, see, et. in, rate section nathrenous rini to it to collines anominal a new and collect managed as reads any property, some or dilact in cellul, etc., and in the branch or half the transfer . " will not durit at high me Delta last exacted by an first or half or half between most officed between the ro. 12 ". Descript description and south course new points in our conclusion that the types commend in believing i. under wer a or The Alven Louisie at male and become aid family science on pubderdeer, 214 111, 265. If, however, as assume, as instrudenta by their monded answer aver and by evidence or fered head the tanking treit stipulation to the contrast to show, that the effort of the conveyance to Entherine P. Sodden was to opente to active truck of the case rind and nature on one brought lets schringer by his ordered and ne replan Ann Henry A. Jearsons to the Connervial Proct ont Savings Sant sat the erica era en l'alleration de l'acceptant la consection des la consection de l'acceptant de l'acceptant de l'acceptant de l'acceptant de la consection de la con theless convinced by our examination of three instruments that the truck precise thereby is not energical by this exception stated in this section of the Chancery act.

These instruments placed the fitte in the beak but gave to the judgment debtor (name ?. Secretari the surplus, evells and page.

to direct all deals with reference to the title, was given the gover to senage and central the land and the title, the right to sell and to receive the proceeds of mortgages, of sales or other dispositions of the premises. It was trovided the trustee bank alght deal with the real estate or make deeds thereto only when authorized in writing by Harry F. Fearsons; that the trustee was not to be required to inquire into the propriety of directions given by Marry ". Jearsons. He was given the right of management, control, selling, renting and handling the property and was to receive the proceeds of any sales. Henry A. Fearson reserved the right to revoke the trust and to depend a reconveyance. He never did either, He is now dead, he a matter of fact, this provision asver at any time in any wise limited the control or interest of Harry P. Fearsons in the premises. Defendants cite Bians v. Laforge, 191 Ill. 598-607; helps v. Grahas, 187 Ill. 67; Von Reeler v. Joully, 267 Ill. App. 495, and Tiret hational ank v. Starkey, 190 Ill. App. 532.

The You issler once involved a spendthrift trust. In the he was a purchaser, and it was applied on his debt. In the hims case it was held that a trust fund created by the will of a third person, and held under the control of trustees directed to pay the income to the debtor, could not be reached by a creditor's bill to an account necessary for the maintenance of the beneficiary and her children, who were dependent upon her for support. The case is practically distinguishable as involving a spendthrift trust. The harkey case also involved a testamentary trust shere the control and assaggment was still in the hands of executors and trustees, and it was held the interest of the debter could not be reached by creditor's bill prior to an order of distribution by reason of \$40. All these cases are distinguishable.

lection 40 expressly gives the creditor power to compel the discovery and application of any property "held in trust for him,"

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pass, all costs are alless us as assessed fire alsafilla youth of to conners and heartest too land and the state, the state or tell and to receive the presents of mortgaget, at walks or other firm eliters to of the premises. It was rowing the tree been at hit deal with antificant lational as as the atwent about edge to above last out by Harry F. I carcons; that the Creates and to be confeed to he sales have the propelety of three black place by there I, fraction, has priface, mille . Joulnas . Incompanas to Ingle all mavin to handling the eroperty and was to reserve the reservice of the Henry A. Penreen reserved the right be revole the tract and to bound reconveyance. We never the algior. De to now need, we a safter of fact, this provinten never at any time to may size theited the control of it of district of the property and all reserves at your to be presented by Place V. Lebergs, 191 Til, Stiester | Dens to Course, Let The Sty . Kealer v. colle. 857 711. Apr. eve test testeral enk v. 190 111, app. 688.

"cotion 40 especially gives the creditor power to come it."

"... overy and exclication of any excepts "held in truet for bin."

Her lark statute. Illinois courts in construing it follow the construction which up to the time of its enactment here had been put upon it by the new tork courts. Actua v. Braham, 187 Ill. 67. The New York courts have held that property, the title to which is held for the debtor in a dry or passive trust, may be taken for his debts.

Verdin v. Blooms, 71 S. I. 348; Hallet v. Thompson, 5 Paige (M.T.)

363; Bluan v. Cameron, 186 N. K. 339, 346; sells v. Liv. 11 N. J. 40.

172. We held the exception of the statute not applicable to trust property which has passed into the control and management of the debtor.

a spendthrift trust and is not subject to be taken for debts of the beneficiary for that reason. They cite Keller v. Keller, 834 fil. App. 198; Equipment v. Frudential, etc., 832 fil. App. 334, and allace v. Ferwell, 250 fil. 610, 627, and similar cases. Keller v. Keller perhaps goes further than any other filinois case in extending the application of the doctrine of the spendthrift trust, which was approved by the supress court in the case of Iteld v. Whitehead, 111 fil. 147, and has been followed ever since. Neither that case nor any other in this state, so far as we are informed, holds that a spendthrift trust will be created unless manifestly it was the clear intention of the creator of the trust to bring such a trust into existence. The evidence here is not sufficient to disclose any such intention.

It is pointed out the beneficiary was the son of the denor and a man of mature years, and evidence was introduced to the effect that at the time the premises were conveyed to the bank by his father the beneficiary was estranged from his wife. He later institutes divorce proceedings. The case reached this court and is rejected in Fearsons v. Fearsons, ESS III. App. 98. The beneficiary was a larger. The instrument by which Henry A. Fearsons conveyed the property was apparently carefully prepared. If it had been the intention to create a spendthrift trust it is an areat it would have been so declared.

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New York etained. This courts is sanctuday in follow the sonetamotion which up to the time of the constant here had been just
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the case reached this court cold is reported in

are required.

Defendants complain the court erred in its rulings on the adelesibility of evidence. Upon objection by plaintiff, evidence offered by defendants was excluded as to alleged conversations between Marry P. Tearens and Matherine P. Madden at the time of the execution of the deed to Miss Madden. These conversations tended to contradict the writing which was a part of the stipulation and to show that she took the title with the understanding it was to be held on the same trusts imposed upon the bank from which she received the deed. Perendants made an offer of proof on this point to which objection was sustained. On their objection, also, evidence was excluded of a written declaration of trust executed by Astherine P. Indden at the request of Marry P. Pearsons long after the stipulation in this case was filed, and which tended to contradict the facts as recited in the stipulation. The evidence was clearly an afterthought inconsistent with the facts as stipulated and was properly excluded.

Defendants point out the conveyance to the bank : revided that the proceeds of the trust should be considered as personalty and not realty, and we are reminded that the statute of Uses is not asplicable to personalty. We are not unsindful of this provision in the original conveyance to the bank nor of the law applicable. The prevision was applicable, however, to the proceeds of the trust rather than the subject matter of the trust itself. The written request of Henry a. and Harry P. Fearsons to the bank to convey to latherine .. Radden, we think, waived this provision in so far as they are concerned. However, in view of the actual provisions of that declaration of trust, as we have already pointed out, and in view of the absolute control over this property which the debtor has at all times possessed and nowpossesses, we hold it is subject to be taken for his debis under either the general rules of chancery or the specific previsions of 140 of the Chancery act. The statute does not exempt from its application property from whatever source which has notually passed into possession of the debter and is being used by his for his own purposes. Defendance complain the court errol in the rulines a une addicated by children and constituted by control of cridence. The constitute of the cities of the control of the cities of the control of the cities of the control of the cities of the cities

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belivery and all of esespence and the integraled has glianceved as beautioned of hipoda rawer and to absorbe and fadd was for al seed to administ and fails beindown see so has affice too plicable to personalty. ... are not unstained of this provinced in the original converges to the bank may of the inversellation for trovision was applicable, however, to the process of the trust parties then the subject matter of the truet treet. The written request of Neary A. and Marry P. Peargons to the bank to convey to latherine P. Madden, we whink, waived this provision in so far as they are noncerned. However, in view of the accust provisions of that declaration of truct, as we have already cointed out, and in whee of the appoints hopensees senit lie to and votach out dains granger, aids were laudenand newpossesses, we hald it is subject to be taken for his debte maker without the general rates of chances or the medicity provident of the diencery set. The arcture door not energy from its aperni kaseng yilangan and dalar anyon yayatan may yayaya natimalig personner of the debter and is being used by his for his own purpows.

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e hold this property was liable for the debts of Worsy . Jearsons, the judgment debtor.

The decree will be affirmed.

DECREE AFFIRMED.

O'Connor, F.J., and Medurely, J., concur.

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anor, T.J., and to turally, T., consur-

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CAVI SILLO. STATES IN SPECT. SOUNICIPAL COURT OF CHICAGO. 549

MA. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

plaintiff in error was arrested without a warrant and July 6, 1930, arraigned on an information which charged that on the let day of July, 1939, he "did then and there unlawfully, knowingly and willfully cause, aid and encourage Marvin Dupont wilson them and there being a male child under the age of 17 years to be or to become a delinquent child, and did knowingly and willfully do acto which directly tended to render such child a delinquent child," in violation of par. 104, ch. 33 of the Illinois Statutes, 1937. The information was aloned by her is allson and purports to have been subscribed and sucra to by her. The record shows that leave to file the information was given; that defendant was present in open court; that the court took jurisdiction of defendant's person and ordered the balliff to take him into custody; that defendant was arraigned and advised by the court of his right to trial by jury; that he pleaded not guilty, waiving trial by jury and submitted his cause to trial by the court; that after hearing the tentimony and arguments of sounsel, the court found defendant guilty in manner and form as alleged in the information of contributing to the Selinquency of a child; that jude out as entered to that effect and defendant sentenced to serve in the House of Correction for one year.

The evidence taken upon the trial is not preserved by bill of exceptions or report of proceedings. The judgment was entered July 6, 1939. February 9, 1949, defendant made a motion to emunys the judgment of July 6, 1939, vacate it, quash the mittinus and mischarge the defendant. The grounds of the notion were stated to an that the information failed to one rise a criminal offense as required by Art. 2, 89 of the Hilmois Constitution: that the information was void because

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Tiple the firster a seculty ledgeric our chire of Trineal's 8, 1819, sawaland to information while of agents of the parties of the same of day of July, 1927, is "did then and there unlearfully, inceining and allfully oute, and and entering the March Liver Live Chara there a convert of the set of agency VI to one out waken alled alon a period deline were of the translating and allier we are the alreadly to ander our child a delicerate of the control of the richaries of sign los, oh, it of the lithests by uner, ills. . 'm intermition ina badirondan anti arti es astrogras Las souli, oi ent te bengis ass mora to by her. The record since that leave to File the large atien fined odd frat thrane as a al france; as Jasinelab tent thevia ass of Tillied and harel at her neeves a tracketta to notreitalize Neet sold yo bealthe but becatered see Inchested Indi tybesees asul mid east osure of the plant to tall type to fair to their aid to true three till by fight of engine his bestinder has youl to later marker June off leaned to the transparies and month at the police of the Body found defendent guilty in mensor and form as alleged in the information translation to the deliaquency of a middle trait of the first to the seven and hi overe at hopedone spannelsh has spalle said at horsens of Carrection for and green.

The evidence token upon the brial is not preserved by bill of emergions or report of proceedings. The judgment was entered buly 6, 1832. Through 0, 1843, Cefendant make a motion to empune the judgment of July 6, 1872, secate it, quash the mittiens and dischers.

1. The grounds of the motion were related to be that the limit of the characters of the school of the limit.

the varification to it purports to have been sommovieded in the year "19," which was 1980 years before the alleged offense was consisted; that the sittimus or warrant of commitment was void and was issued in violation of Art. 2, 12 of the Constitution of Illinois and the fourteenth amendment to the Constitution of the United States; that defendant was not represented by counsel and the court was althout jurisdiction to try the cause for that reason, and that the trial was held in violation of Art. 2, 15 of the Constitution of Illinois; that defendant had a meritorious defense which he was prevented from presenting without fault or negligence on his part by reason of excusable mistake and ignorance.

The People by the "tate's Attorney answered and later made a motion to strike defendant's notion which was granted and the motion denied. Defendant then sued out this writ of error.

It is urged for reversal that while the information charges the orime to have been committed July 1, 1230, the information appears to have been verified in the year 12. Defendant cites recole v. Feinstein, 255 Ill. 570, and other cases. In People v. NeCullough, 205 Ill. App. 269, this court held that where a defendant went to trial eitheut objecting to defects in the verification of the information such defects were waived.

because it fails to set out what particular acts, if any, defendant committed. People v. Ilis, 185 Ill. App. 417, and statlar cases are relied on. The information here was in the language of the statute, and this was held to be sufficient in record v. sallace, 185 Ill. app. 814. A similar ruling was made by this court in People v. aliar, (Opinion abstracted) 306 Ill. App. 500.

Other points made by plaintiff in error are based upon the assumption that the information was fatally defective which, as we have seen, was not the case. It is, therefore, unnecessary to sive further consideration to such points. The judgment will be affirmed.

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It is unject for y we per the thin information charges the extension charges the extension condition that I littly the information egaborare to have been been replied in the year lift. To end at the interpretarion that the per lift, high, idea, white court had the eye a defendant went to extension with informal stand of the information of the information of the information.

It is arged that the information fulls to charge a crise because it fails to set our what province acts, if any, defendent in a set of the constant in the constant in the information bets was in the language of the statute, at this was baid to be sufficient in impaly v. islies, 100 iii. App. 214. A similar ruling and sede by this near to feetle v. islies (upinion abstracted) for iii. App. 200.

There points wode by plaintiff is orror are inved upon the comption that the information was fatally defective which, as we are exception that is not not a point. The juigment will be affirmed.

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APPELLA CURLINGKI,

APPELLA CURT,

SUPPLIES COURT,

GOOR GOUNTY.

MA. JUSTICE MATCHETT DESIVERED THE OPINIOS OF THE COURT.

In an action for personal injuries caused, as alleged, by defendant's negligence and upon trial by jury there was a verdict for plaintiff with demages assessed at 1750, on which the court everruling motions of defendant for a new trial entered judgment, and defendant appeals. It is contended that the court erred in overruling a motion of defendant for a directed verdict at the close of all the evidence; that the verdict is against the manifest weight of the evidence, and that the motion of defendant for a new trial, or, in the alternative, for judgment notwithstanding the verdict, should have been allowed.

Plaintiff was injured November 19, 1938, in a collision between two automobiles in Roccoe street near the intersection of that street with Pulaski road (also known as Grawford avenue), in the City of Chicago. Plaintiff, a married lady, lived with her husband, who was a painter, and their family at 3411 %. Marding avenue, less than a block from the scene of the socident. Plaintiff and her husband had been shopping at the store of Bears, Roebuck & Company located on Irving Park boulevard and Milwaukee avenue. They started home, he driving a 1936 Chevrolet automobile. Plaintiff sat in the front west with her husband. Their little boy about two and one-half years of age was in the back seat.

Pulaski road has street car tracks in it. On the day in question it was dry and in good condition. It runs north and south while Roscoe street runs east, intersecting and ending at Fulaski road. Plaintiff's husband testified he was driving south on Fulaski turned road and east into Roscoe street; that when he was in about the

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In an action for personal injuster counsed, as alleged, by antital and light of the court overally plaintiff with damages assessed at 1750, on which the court overalling which of defendant for a new irist entered judgment, and defendant appeals. It is contended that the court erred in overalling a notion of defendant for a directed verdict at the close of all the evidence; that the verdict is equinat the senior weight at the evidence, and that the motion of defendant for a new trial, or, in the alvernative, for judgment newlikelending the verdict, should have been alleged.

etreet with Fuluski road (also known as Grasford aveaus), in the dity of Chicago. Flaintiff, a merried lady, lived with her husband, who was a painter, and Their fauily at 7-511 d. Harding avenus, less than a block from the secae of the accident. Flaintiff and her imabase had been shopping at the store of ware, Hasback & Corpany leaderd on frame were units.

Fulacki youd had street cap tracks in it. On the day in cuestion it was day and in good condition. It runs parth and south the condition of th

middle of the street he for the first time observed automobiles coming west in cacoe street and saw one coming toward him. He says the front and of his automobile was straight with the east curb line of ruleski road; that he was facing east and defendant's automobile was about 20 feet east of his coming west. He blew the horn. Plaintiff said to him, "lock cut. Those fellows are not lookin where they are going. " Br. Jwiklinski says he then made a dead stop with his car facing a little southeast and the south end was then about 3 or 4 feet sast of the east curb of Pulaski road. Wr. Owiklinski blew his horn again, and the other auto struck his. He says the front busyer struck close to the fender of the car, lifted up the running board, sampled the left fender and pushed the automobile in which plaintiff was riding about one or one-half of a foot. His wife, he says, bounced against him, then struck the right hand side of the car. Ar. Welklinski told her to get out and helped her to do so. He says there were two boys in the car that hit them. These boys had a radio and be heard it going full blast. He called the police station and the police case and took the boys to the station. They were near their home. where plaintiff went. The was at the time in the eighth worth of pregnancy.

Pulaski road is about 40 feet wide. Plaintiff's husband says he drove into the intersection at a speed of about 3 miles per hour. Ours were parked on Pulaski road, to some extent obscuring vision. Hoseoce street is about 20 or 25 feet wide. There was an apartment building on the northeast corner of the intersection. Mr. Uwiklinski said to defendant, "Thy don't you look where you are going:" to which defendant replied, "The could expect anybody coming from this way." Plaintiff's husband says there was traffic going north in Tulaski at the intersection. Plaintiff testified in detail, corroborating for the most part the testimony of her husband as to the way the collision occurred.

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ngless galidated as it recode acit well and too as describe and to albita west in Beense extract and case contract the consecutive the Trent and of his automobile was straight attention and in her trent and wildow the a trainming the four pairs I have and foods them I washed about 20 feet oser of him coning .cor, in his the hear, sad to him, "look out, " These fallows are louting where they are going. * We. Swittlineki sage he taun mole a leef the like bir cop fuel b up & force many and how diseased has inscripted alittle a major? permit ald gold live that it .g. . Lang later to done done and to dane spain, and the other such struck bin. We mare bus from bounce etrues olses to the forder of the car, lifted on the running berning. 'islants fo doids at allegendue and Buleur has gone't fiel all boileans was riding about one or cas-half of a root. "Le mite, as serm, bounced against bis, then struck the wicks head also of the cap. Culbineki wald har to got out and relead hes to as es. Se says than were two boys is the car that his them. There bure bus a sails and in beard it going fall black. He colled the maltes station and the golies came and took the toys to the starion. They were the boar where plaintly was. the was at the time is the election waste of TOWNSHIP ..

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Care were parked on Inlant road, to some extrat oracering vision.

Cosoes atreet is about 30 or 12 feet wite. Inerc was an apartment building on the mortheast corner of the interrection. Sr. swikitheti building on the mortheast corner of the interrection. Sr. swikitheti said to defendant, "the could expect anybedy seming from tale may."

Infendant replied, "the could expect anybedy seming from tale may."

Tlaintiff's intered. There was traffic going north in Tolanti at thereselies. Tlaintiff testified in detail, serreboreties for the most part the testified in detail, serreboreties for the most part the testimony of her huckend as to the very the exilision.

beforeast, twesty-three years of age, cays he was driving a 1980 flymouth four-door sedan, two months old; that he took his car out of year and left it in neutral because care were parked on Julacki road and that when he got there he applied the brakes slowly. He had been looking to the left to see if there was any moving traffic because he was going to turn north into Pulaski road. In the meantime there was a crash. He says he was moving about a half sile an hour. Three or four cars had gone through so he sloved down fearing he could not go through because it was a busy corner. Defendant says that after plaintiff got out of the car she walked up to them and said, " You young brate should not be driving a car. " We told her he was not a young brat. He saked plaintiff if the little boy was injured. He says there was a radio in the car: that it was aturday and a great ball game was on. Leon Eyskowski was in the car with him. Defendant says when about 12 feet from the curb line of Pulaski road he glanced to the right and then immediately to the left.

Defendant's companion, who was with him in the car, did not testify, and no reason is given for the failure to produce him. Defendant produced three other witnesses, salter hulks, buil fangen and Carl saldbauer. Waldbauer said he was driving north on Julaski road: that slaintiff's ear coming from the north out in ahead of him in the intersection and made a left hand turn when the witness was about 80 feet from the intersection. The witness stopped and got out. The automobile that made the turn, he said, was not going "very fact." Kulka, a decorator and painter, testified that he was walking south in Pulaski road on the east side of the street north of the intersection. when he was on the north eide of hoscoe, he saw defendant's ear going west on Roscoe atreet. He then was the car in walch laintiff was riding sake a left turn; then he heard the two fenders smark "and that was all." This witness said defendant's our had stopped and that the other car struck defendant's car after 1t was stopped. Tangen, an employee of the Lurises lines, says he was just leaving a

Lefendent, tweety-three years of whe ears he was delving a 1958 Flymouth four-dace saden, two course of it was to teck his car so before the same personal largues of it alof but may lo suo "Missis series and helica ad erect for as new facts and as a rest real and of That guives yet are the left to see if their yet any moving traffic because he was going to ture north late l'electi roni. In the sentime those was a creati. He says he wering though a half alle an hour. Three or four care had gone through so he chould show Pearling he could not go through because it was a busy coron. Beforder's ours has made of our resine rate one and he sue soy littlefally reste tasks anid, " Tou young brate should not be driving a con. " its valid her he one not a young brate. He served plaintiff if the living boy was injared. Se caya there were a radia in the cert that he was deturdey and e greet ball game one on. Loos Eychowell was in the car with bis. Defendant says when shout II feet from the earl line of bulants reed he glanged to the right and then immediately to bis left.

Refendent's companion, who wer with his the car, did not testify, and no reason is given for the fallers to produce bin. fendant produced three other altereses, .iter fulks, tall Teagen and Carl Waldbours. Maldbours and he was driving north on bulanki and he hassis his for sirous our myst calmentur at Yillianally fact place in the intersection and make a left bear turn when the witness was about 50 foot from the Astacection. The Almens stopped and got out. The entemptile that made the turn, as said, use not seing "yery fast," Kulka, a december and painter, tentified that he was walking acutin in Pulanki road on the coat side of the street sertit of the latersection. Then he was on the nerth cids of hoose, he can defendent's car going met on Rosson street, He than way the car is watch platertiff was riding make a left tarn; then he heard the two feeters amak Sought had wer a branched blan sender will " the war had had and that the other car otruck defendent's one after it was stopped. Tangon, an employee of the Cortace Lines, care he was just leaving a

candy store on the northeast corner of the intersection and that he waited at the east ourb line of Pulacki road and on the north cross walk of Tosone street. He also says defendant's car stopped before the collision occurred.

Plaintiff was riding in the car driven by ber husband. The was not in control of it, and it is not contended that the evidence tends to show she was in any way guilty of contributory negligence. The complaint charges general negligence of defendant, and in particular that he failed to apply the brakes, failed to keep a lookout for other care lawfully using the streets and failed to give any warning by blowing a horn or otherwise. There was a motion for a directed verdict at the close of all the evidence, and defendant argues quite at length that it was error to refuse it. He evidence was offered by plaintiff in rebuttal and defendant says that his defense having been setablished by uncontradicted evidence, the instruction should have been given. Defendant cites cases such as Yuller v. Defaul University, 200 Ill. App. 261; Simons v. Dole Valve Co., 288 Ill. App. 268, and other cases holding that where an affirmative defense is established by uncontradicted evidence, an instruction requested by defendant in its favor should be given. The rule invoked is not applicable to this record. There was evidence tending to support the allegations of the complaint, and defendant admits that this was sufficient to make out a prime facie case. Other evidence was given by witnesses for defendant, which as a matter of fact, contradicted defendant's testimony.

In weighing all the evidence, plaintiff was entitled to have the benefit of all the evidence tended to prove and to have all just inferences which could be drawn from it regarded as true. If the jury could, without acting unreasonably in view of the law, find the issues of fact in her favor, then she was entitled to have her cause submitted to the jury. This is the rule laid down by the Juprese court in Libby, Mabeill and Libby v. Gack, 222 Ill. 206, to which this

eardy store on the northeast cornier of the intersection and that he waited at the seat curb line of fulcast cost and on the north areas walk of heroes ntreet. The area cays defendent's our stopped the

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a her favor, then she was entitled to have her sauss oub-

court and the surrene court have constantly adhered in a long line of cases of which plaintiff cites <u>Folloy</u> v. <u>Shloago hapid Transit Co.</u>, 335 ill. 164; <u>People v. Hanisch</u>, 561 fil. 465; <u>Thite v. City of Belleville</u>, 364 fil. 577, and defendant cites <u>Helly v. Chicago City Railway Co.</u>, 283 ill. 640. We hold the court did not err in denying the motion to instruct the jury in favor of defendant or in refusing to enter a judgment for defendant not ithestanding the verdict. For can we say, after giving attention to the evidence, that the verdict is so manifestly against the weight of the evidence as to require a reversal.

We are of the opinion that it was a question for the jury to determine whether, as a matter of fact, defendant was guilty of negligence at the time and place in question, in his failure to observe and warn or failure to stop his car in time to have prevented the socident. Befondant knew the intersection under all the circumstances was dangerous, as the evidence shows without contradiction. The jury had a right to believe that if he had been giving the attention to the road which the situation demanded the collision would not have occurred. Both parties were fortunate in that the injuries were not more severe. The law applicable to this case is perfectly clear. The material facts are not so clear but are of a kind and asture which under all the circumstances created issues properly submitted to the jury. We are not able to cay that the jury acted unreasonably. It is not contended that the danages are excessive.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McBurely, J., concur.

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O'Connor, 1.7., and McLurely, 7., conour,

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EVA JOKIEL.

HITHOPOLITAN LIP TENERANCE WORDLINE. a Corporation.

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Appellant.

SOOK GOUNTY.

LEONARD JOKIEL, et al.

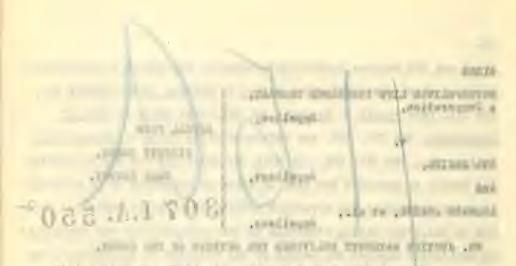
Appellees.

MR. JUSTICE MATCHETT DELIVERED THE OFINIOR OF THE COURT.

Esenuel Jokiel died Bovember 12, 1938. He hald a life insurance colicy in the plaintiff insurance com; any for 1,000, issued Fay 1, 1930. This insurance policy when issued named va Jokiel, wife of Emanuel, as beneficiary. It also gave to the insured the right to change the beneficiary. May 8, 1958, Emanuel Jokiel made a written request for change of the beneficiary asking that his son, Leonard Jokiel, a minor, be substituted. About April 11, 1939, the insurance company had received a request for a duplicate policy in the form of an affidavit which purported to have been executed by Teanuel Jokiel and defendant, ive Jokiel. The affidavit stated that the original policy was lost and could not be found. A duplicate policy was issued and the insurence company indersed upon it the name of Leonard Jokiel as beneficiary. The insured died, as above stated, leaving no estate whatsoever.

va Jokiel, who had possession of the original ; elicy, asde arrangements for a funeral for the deceased to cost 1600, executed her note to the undertaker, Fr. Winiarski, for that ascent, assigning the original polloy as security. Mr. Viniarski discounted the note with the Femorial Service, Inc. Shen the Seportal Service, Inc. undertook proof of ito claim with the insurance company, it was informed that proof had already been made by the new beneficiary, Leonard Johish, and also was informed of the impance of the duplicate policy.

Plaintiff on June 7, 1939, filed its bill of complaint



insurance policy in the plaintist insurance seminar for 1,500, issued in murance policy in the plaintist insurance seminar for 1,500, issued may 1, 1850. This insurance policy when increase maned we tokiel, of head of headistry. It also pare to the insured the right to obenge the beneficiery. Ity d, 1870, insured the sent written request for change of the beneficiery excits, that is the language of the beneficiery excits, that is the insurance company had received a request for a daylingte rolley in the form of an affidavit which purposed for a daylingte stated that headiley was located and the insurance occasely independent setted that constd Jokiel as beneficiary. The insured tied, so shows trained,

Eve Jokiel, who had possession of the original jolicy, make arrongements for a functal for the decembed to cost 1600, executed her note to the undertaion, in liniareti, for that secuet, assigning the other of the insortial fervice, Inc. When the Comertal Service, Inc. undertook proof of its claim with the insurance company, it was informed that proof had already been made by the new beneficiery, Launard Jokiel, and also was informed of the insurance of the duplicate policy.

TATALOGUES OF TAXABLE PARTY, TOTAL AT THE PROPERTY

against wa Jokiel, Leonard Jokiel and Memorial Service, Inc., setting up these facts; also, that a loan had been made upon the policy in his lifetime by manual Jokiel; admitting a libility of .780.87 less cost of suit; praying that the claimants might be required to interpleted among themselves, and that further suits should be enjoined.

The evidence was heard in open court and a decree was entered February 26, 1940, finding the amount due, less costs, to be \$757.57, which plaintiff was ordered to pay forthwith to the clork of the court, which the clerk was directed to pay to Leonard Jokiel upon his attaining his amjority on June 1, 1940, or somer to his legal guardian, and that further suits by the parties should be enjoined. From this decree Eva Jokiel and the Memorial Lervice, Inc. gave notice of separate appeals.

It is contended in the first place that 'va Jahle' is ontitled to the proceeds upon the theory that one who acquired a boneficial interest in an insurance policy by the payment of president thereon under an agreement that she shall be the beneficiary sannet in equity be defeated by the substitution of a new beneficiary without her knowledge or acquiescence. The proposition is good law as held in cases cited. Supreme Louncil, A. A. v. McEnight, 238 fll. 349; Columbian Circle v. Budra, 298 Ill. 599; Order of Columbian Entents v. Mattel, 184 Ill. App. 15; somen's Catholic Order of Jaresters v. Mill, 191 Ill. app. 629, and leaf v. Leaf, 92 Ky. 186. The proposition, however, is not applicable to the facts of this case for the reason that the evidence fails to show that Eva Johiel had such an agreement with manual Jokiel or that she made such payment of the premiums. Indeed, in her answer Eva Jokiel does not claim the proceeds of the property upon that theory but on the contrary that there was no effective substitution of Leonard Johiel as named samefictory.

Her testimony is to the effect that she was married to Example Jokiel, August 27, 1829. Each of thes had contracted a former marriage by which they had children. Amanuel and Eva lived together against Was Johiel, Laonard Johiel and Tempriel Service, 180., serting up those facte; also, there a loan had been made upon the policy in his lifetime by Teamuel Johiel; eduliting a landlity of Joh. 27 Loca cost of suit; praying there has also claimants adobt he equalsed to interpland among theresives, and that threther suits count we exprined.

The evidence was heard in open acust and a daugen was extered Sebrared Sebr

-as al fallet av. ved too first place that the fall is an -mind a new years with note hard plantiff our many surences; and by Sekkill published to foreign; out 4d voltor constraint as at the world Estail ni tenno qualcifored alle ed linda and tallocarpa ne usha soured? randity yealstrand was a lo suitestrates all his backets of tipe her Browledge of Acquiescence. The proposition is good in ac held in that all the contract of the later of the la Columnac that a tenne into itt, and areas at beleases tellering to Market, Inc 1721 Ages 181 mese's Suited in 1922 of Personner V. Mill. 193 131, day, 600, dat hear of Leady No. Co. The properhieses however, is not applicable to the deep this ease for the reason fine the evidence fails to she was a lief to all a former manipary and to sampay mens abou and sady we Island formant dille eds to absence wit mixes see need Islant and rememe and at become property upon that theory but on the contrary that there eas no effective substitution of Leonard Jokiel as asaed beneficiary.

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for eight years, but in January, 1936, he went to live with his daughter for financial reasons. The says she got the insurance policy wis months after their marriage and had it all the time afterward. The says, "I save the mensy that I pay for this policy while I had it in my possession. I pay every menth." Again she says, "I save money. A loan was made on the policy because I needed money because he was cick. I paid on the policy 5.00 every month for sight years. I got the 15.00 menthly from saving it. I got money from my sen and from Mr. Jokiel's son. I pay, I save. I got money from a daughter, she is good. I save my mensy, they work, my husband work, my two sons work. I save. Alliam gave me money and my two sons and I pay policy."

william Jokiel, the son of Emanuel Jokiel by his former marriage, was called as a witness by Eva. He testified that he lived with his father and Hrs. Eva Jokiel for eight years after they were married, and he lived with Eva Jokiel up to the time he was married to her nicce. He says, "I was paying the premium from time to time as were the other boys. I did not have any convergation with Nattle Heft [daughter of Emanuel] wherein she specifically asked me to pay the current premium. *** The children started paying the premiums on the policy in 1938 after dad was taken to the hospital and after he caparated from Eva Jokiel. Hefore January, 1938, Eva Jokiel paid the premiums. Eva Jokiel made payments for eight years. "

The re-cross examination of william Johiel was as follows:

"". The (Lva Johiel) made payments during all the cight years: ...

Tes. .. Do you know where she got the money? "". subenstein: That is objected to, if the court please. The sitness: ... My dad (damaged) was working. "". Hofeld: .. And he gave her the money out of his own pocket? The sitness: de was working. ".. And she physically said the premium? A. No. ".. The money that 'va paid the--- ... He was her husband. The was entitled to it. ".. Wid you see his give her the money? A. The check, all that he was earning, every week, he was

Top olight years, but in January, 1273, he wont to live with his jaughter for financial resears. The ears was set the incurrant policy of the after their merriage and had it all the time afternant. The ages, "I care the money than I jay for this policy while I had it in my posession. I say every meath," each sets, a care money. A loan was made on the policy because I needed somey because he was at a care. I got the I.20 every meath for eight years. I got the I.20 monthly from eaving it. I got heavy for eight years. I got the I.20 monthly from eaving it. I got heavy for a got on and from it. I got heavy from a walleter, one in the Jokis! a sen. I got noney from a walleter, one in the says. I have noney from a walleter, one in the says. I have noney from a walleter."

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"Allies Johns, the som of Leanuel sphiel of her forest marrings, was selled as a ultress of Eva. He terrified that he lived with his father and fre. Eva Johiel for eight pears after they were carried, and he lived with "ve Johiel up to the time he has married to her niece. He says, "I was tering the preside from the to the sa time as fine as fine of faughter of Fannuel] wherein the questionally sched so to the ourreat preside. "?" The children started negling the president on the current preside on the field after had was taken to the hospital and after he test for the first from Tvo Johiel made payments for sight years."

**. The (fun Jokiel) made payments during all the sight years A.

Les. C. De you know where she get the money? Or. Substicted: That is

was verking. Sr. Hofeld: C. And he gave her the money out of his own

peakst? The Vigness: He was verking. C. And she physically gold the

presium? A. No. C. The money that ive puid the--- A. He was her

presium? A. No. C. The money that ive puid the--- A. He was her

inc was entitled to it. C. Did you cen him give her the

turning in. .. How such from time to time did he give her from his own money to pay these presiums? Mr. Subenstein: If he knows. The sitness: A. He was giving in the whole check. Mr. Hofeld: .. He would give her. Tvs. the whole check and she would go down and yay the presiums? The sitness: A. The was paying the presiums out of that money. U. Did he give her a check to pay the premiums? A. He was living with her and supporting her. Q. And what she had left over was here? A. Yes."

This evidence from a witness friendly to Eva Johiel and called by her shows she did not make payment of premiums out of her own funds but only out of the carnings of her husband, the insured.

Jokiel lived at her brother's house a few days prior to New Year's Eve of 1938; that he lived at her home from the latter part of January, 1930, until the latter part of April, 1938, continuously; that he then went to the home of william Eubistal, a con-in-law, with whom he stayed for about two or three weeks; that he went to the hospital in the middle part of May and stayed there until June, 1938, and came back to her home about the 20th of June. He was in the hospital a month before his death. The testified that she had no interest in this policy other than "we paid the premium. The first premium was paid either in December of 1937, or January, 1938, by my father. The children all contributed to the payment of the premium."

The theory of Mrs. Jokiel's answer was that there was no valid change of the beneficiary. The denied Emanuel requested the company to change the beneficiary and denied she had signed an affidavit and release with Emanuel stating that the original policy had been lost or destroyed. The avers that the duplicate policy was obtained by fraud and misrepresentation; that the ariginal policy was at all times in her possession and was at no time lost or destroyed.

turning in. i. Now muck from time to time did he sive hop from his own money to pay these premiuss? Mr. Enhancerin: If he happen. The literary A. Ma was giving in the whole check. Ex. estable: i. the would be a six in the whole check. Ex. estable: i. the would be a six in the check of the his left over was the six in the cover was the six in the cover was the six in the cover was

This evidence from a vitness friendly to two datist and collect of pressure on the did not believed by her stown on the did not believe out fur sundame, the insurance of her numbered, the insurance.

Marriet Nest, daughter of manual, testified the heanter solded lived at her heart of solded lived at her house from the days order to see her's read of 1970; that he lived at her house from the latter part of her'd. 1924, destinatedly; the the latter part of her'd. 1924, destinatedly; the the tien sold to the loose of cilian limistal, a con-to-ise, with enough the fact for cont to the security latter for the art three means the heart to the security late the back of lay and staged there was in the heartiful to bed to her home about the filted that the was in the heartiful to this polar back to the first president in this polar that at the free has the first president. The titler president at this president of the president.

The theory of hre, Jokiel's answer was the there was no ill obel of the control o

The evidence shows that May 6, 1936, the insured presented to the insurance company a written request that his son, Leonard Jokiel, should be massed as beneficiary to receive the proceeds of the policy in the event of his death. The document is signed by Leanuel Jokiel by his mark and is witnessed by "alter heft. A paper carrying the legend "to be executed by the insured and the beneficiary" and described as "Affidavit with Release and Agreement," had been filed with the insurance company about April 11. It purports to be executed by Leanuel Jokiel and Eve Jokeil, is signed by Leanuel Jokiel by his mark, and purports to be signed by Eva Jokiel by her mark, and subscribed and sworn to before william Kubistal, a notary public. The instrument is under seal.

william Kubistal testified he saw this instrument, which appears in svidence as Leonard Jokiel's exhibit 1, at his office on April 11, 1938; that Emanuel Jokiel and Walter Meft were also present; that he car Emanuel sign it and knew the signature to be genuine and correct; that at that time it purported to bear the mark of Eva Jokiel. walter Weft brought anamuel Jokiel to his office, and amanuel asked him to acknowledge his signature. He put on the acknowledgment and also acknowledged the signature of Iva Jokiel by mark, and gave the instrument back to Janual Jokiel. We had been a notary public for fifteen years and adoltted he did not see Eva Johlel for two and one-half years prior to April 11. He saw her twice after that time when the visited imanuel at his home. We did not know who put in the words "Eve Jokiel" and her mark. He (the witness) did not do it and he did not see ava Jokiel make the mark. Amanual Jokiel was living with walter Heft at this time. hen he acknowledged the signature of Smanuel Jokiel he administered the oath to him as a notary public, then affixed his own signature as notary.

Eva Jokiel testified she did not make the mark, that she never appeared before Aubistal and that she had never told anyone the

The evidence chown that Lay 8, 1881, The lumened processed to the incurance contents to the incurance content of that into each is content. Jobial, whould be named as beneficiary to receive the proceeds of the policy in the event of his desth. The document is claumed by secured located by his mark and he elitared by secured lay his legend "to be executed by the incurred and the heartflay" and described or "Affidevit vith Sulesse and Agreement," had been filed with the insurance nompacy about Agril 11. It purports to be executed by his mark, and purports to be an entred by his mark, and purports to be sufficient thing that its signed by been not, and purports to be sufficient to be sufficient the heart public. The nubberthed and evern to before villian indicately, a netary public. The

Apide tangement and each to be literatured at the contract of appears in avidence as Leonard Cohiel's exhibit i, at his office on April 11, 1828; that Swampi Johish and alter for a to preparit that he can immust eight to and ince the structure to be granted and gy2 be show and man it berrypered in that the Indi Illerences Cokiel. Malter Meft brought manuel Jokiel to his office, and Jasanuel saked bin to adinopledge his eigenfure. he put on the schooledgeent aven him after of laidly out to represent all heginalymedia sells for instrument book to limental dekiel. We had been a notery public has not not little and see you had no heatfale has young needed not one-half years prior to April 11. soid tail totle spirt ted use sk when she visited dwesmed at his home. He did not know who put in the words "Ive Johiel" and her mark. We (the sitness) did not do it and to ald not see for Johiel make the mark. Emenuel Johiel was living with malter Hoft at this time. Then he arknowledged the signature and they weared a me paid of they mill be published by Latitob Laurant to . Taion as pruvangia nuo aid benilia nedi

eds field , Fram eds mans ton his ads belittes loldet avil eds supposed beloves had she that the late belove told beyong tove policy was lost. The evidence shows has Johiel did not join in execution the instrument described as "Affidavit with release and Agreement." There is, however, abundant evidence that the signature of Luanuel to this paper was genuine; also the writing filed on "ay 6, in which he requested his son, Leonard, be substituted as beneficiary.

The execution of the joint decusent filed April 11, was unnecessary in order to effect the change. When the written request of Emmnuel Jokiel was filed on May 6 with the insurance company, the maxim that equity regards that as done which ought to be done became applicable, and the beneficiary was changed from Iva to Leonard.

The same I Jokiel had done everything he could do. His intention was manifest and equity would carry it out. Lavanagh v. Hew England Butl.

Life Ins. Co., 258 Ill. App. 72; Bun Life Assurance Co. v. illians,
284 Ill. App. 222.

It follows the court did not err in decreeing Leonard Jokiel to be the beneficiary of the policy and that Iva Jokiel had no vested right in it. The Memorial Service, Inc., as assignee, had no greater rights than the assignor, Iva Jokiel, in whose shoes it stands. A policy of life insurance is not a negotiable instrument and one who holds it cannot by transferring it (in the absence of estappel) give a better title than he has. Feople v. Fichigas Eve. Trust Co., 253 Ill. App. 428; Fatek v. Baim, 298 Ill. App. 405. Femorial Service Inc. must look elsewhere for the collection of its claim of 1600. The Judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and Modurely, J., concur.

ralley was look. The evidence successed til not join in executing the instrument described as "iffidavit vith belance and Agreement." There is, however, divadent evidence that the eigenfurn samed to this paper was genuice; him the vertital Vilse on "eg S. in which he requested his aca, Leonard, he substituted he wantleiary.

The execution of the joint decument filed april 11, was unin exter to effect the charte. The incurrence company, the
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mails that equity requests that as done which ought to be done because
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manifest and equity would esery it out. Paranagy v. Mrs intention! Turl

It follows the court did not err in decreater Lenneys Joriol to be the beneficiary of the policy and that was Louis had no vected right in it. The Famorial Lervice, inc., as assigned, had no vected greater than the araigner, we donied, in whose site at and greater than the araigner, we donied, in whose site stands. A policy of life immytance is not a negotichle iderrument and stands the samet by transferring is (in the absence of estapped) give a better title than he has. Frank v. sichinal Eve. Track Co., Crvice inc. mast look eleawhere for the collection of its claim of two claims of crvice inc. mast look eleawhere for the collection of its claim of two claims of crvice inc.

THE REPORT OF THE REPORTS.

o'Genner, P.J., and Welaral

41353

ADELATDE EBEL.

Appellant

Appellees.

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MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an azended complaint charging that her physician, Or. Patrick A. Fullivan, and her landlord, Alexander Gasoloff, without probable cause instituted proceedings in the County court of Cook county to have her declared insans. Paragraph 4 of the complaint averred Dullivan caused his signed certificate to be filed with the clerk of the County court to the effect that he examined plaintiff and believed her to be mentally deranged and in need of treatment; that Casoloff want to the office of the clerk and made application on oath "to try the question of insanity" in the matter. Paragraph 5 averred defendants knew the things said to have been alleged by them in paragraph 4 were known to be false. Faragraph 6 stated by reason of defendants' actions a warrant issued for the arrest of plaintiff; that she was taken to the Cook County ! eychopathic Mospital and detained there until September 10, 1937, when she was released by the hospital authorities.

Casoloff answered denying he had acted with ullivan in the matter without probable cause, and denied the averments of paragraph 4 of the complaint. As to the alleged acts of Br. Julivan, he said he was not informed but denied he (dasoloff) signed any false statements or that plaintiff was imprisoned because of anything done by him.

Jullivan by answer admitted he signed the certificate stating he had examined plaintiff and believed her centally incane, We further enewered that an examination made for him of the records in the County court showed that unsolute, un august 24, 1837, MR. JUSTICE MARCHART ELLIPATED FOR CRITEIN OF THE WALL.

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disoloff answered denying he had noted with Sollivan in the matter althous probable cause, and dealed the averagests of paragraph & of the complaint. As to the calleged note of the fallivan, he said he was not informed but denied he (Sacoloff) signed any false electroned because of anything dear by ments or that plaintiff was incrisoned because of anything dear by

Mallivan by answer admitted he signed the certificate
stating he had examined plaintiff and believed her mentally income
etc. He further asswered that an examination made for him of the
records in the Jounty court showed that the coloff, on success 24, 1277

appeared at the office of the elerk of the court and signed an application to try the question of plaintiff's insanity; that in this application Gasoloff said he believed plaintiff insane and that her own and the welfare of others required her restraint or commitment; that the records further showed the application was suorn to before the clerk and delivered to him, and "this defendant states that he has no further information or knowledge."

As defense number two defendant Sullivan stated that Deptember 1, 1957, on the report of a commission duly appainted by order of the County court, plaintiff's disease was found to be sehi-sophrenic psychosis paranoid trend, and that she was adjudged by the court to be "an insane person." As defense number three defendant Sullivan alleged "The certificate made by him, on, to-wit: August 24, 1937, was in the nature of evidence required by the statute of the state of Illinois in a proceeding to try the question of insanity of the plaintiff, and was made in good faith, with probable cause, and without ulterior motives."

A replication by plaintiff was stricken with leave to file an assended reply, which was filed and is: "In reply to defense number two (2) of the defendant, Dr. Fatrick A. Julivan, plaintiff states that she made an investigation in the office of the clerk of the County Court of Cook County, Illinois, in the matter of the alleged insanity of the plaintiff, Adelaide Del (No. 140310); that said investigation discloses that a commission was appointed by the Court in said case consisting of Dr. Norrie Braude, Dr. N. Joweer and acting Judge William G. Knoch of said court; that while it appears from the records of said cause that on September 1, 1937, said commission reported that plaintiff's sental disease was found to be schizophrenic psychosis paranoid trend, said report was sither in-

appeared at the office of the elect of the start at signal an appeared placetion to try the question of placetiff is monity that in this application besolved and he believed platmiff is more on. That now one and the callers of others required or resigning or consistent; that the pecords further showed the equipality was rearn to before the close and delivered to bin, and "this elect that he had not utther interested or hard ign."

As antener number two defendant lality as ethick that order of the County court, plaintiffs along was found to be the County court, plaintiffs along was found to be the Linear person, I is defendent the court to be the land entities and as him, on, to-with ingust 54, inliven alloqued "The certificate near by him, on, to-with ingust 54, 1937, was in the nature of cultons required by the statute of the cause of the charte, and was made in good faith, with probable cause, and

A replication by plaintiff was etticers with leave to friend an amonded reply to defence an amonder two (8) of the defendant, ir. Fairies A. Willvan, plaintiff number two (8) of the defendant, ir. Fairies A. Willvan, plaintiff state that the make an investigation in the matter of the elacter Gounty Court of Seek Scanty, Thirott, in the matter of the elacted insenity of the plaintiff, Wheleide Feel (No. 140518); that each investigation discloses that a counteston was appetated by the seek investigation discloses that a county that while it appears and Acting Judge Filliam W. Moreh of each court; that while it appears that the moneron of said community of said community plaintiff a contact of Veptence was found to be proved that plaintiff a contact discense was found to be

null and void and the signatures of said physicians to said report obliterated; that through more insdvertance (so the universigned was informed by a deputy clerk of said court) the name of Acting Judge William O. Enoch, of said court was not obliterated from said report. thereby waking it appear like a judgment order that was authentic. when as a matter of fact it is not. Said investigation on the part of plaintiff further discloses that no judgment order appears in said lasanity proceedings in said court, except as heretofore stated; that said insanity proceedings were ordered dismissed by said judge on towit: the 9th day of September, 1937, whereupon the plaintiff was released from oustody the following day, deptember 10, 1937. The undersigned has been informed by a deputy clerk in the office of the clerk of the County Court of Cook County, Illinois, that the said alleged report of said commissioners was and is an error that beclouds the record of said proceedings, making it appear that plaintiff was thereby declared insane, when in truth and in fact she was not. Plaintiff prays that on the trial of this cause that said defendant be precluded from offering a transcript of said report of said commissioners in evidence as alleged in his defense number two (2) as incompetent and legally insufficient; also from offering any other evidence in support thereof, "

Defendants moved to strike this reply. The motion was mustained. Plaintiff elected to stand on her reply. Judgment was entered for defendants, and plaintiff appeals.

Plaintiff argues that under the Civil Fractice act (Ill. Rev. Stats. 1939, ch. 110, \$45, p. 2417) the motion to strike or dismiss takes the place of a demurrer, and that the reply as to defence number two of Sullivan presents a perfect defense.

Defendants say the amended reply was had because the matters contained in it were neither stated positively nor on information or belief as required by \$35 of the Civil Practice act (Smith-Aurd Anno. Stats. par. 159, p. 176). This is not only the rule required

tyous blas of analoistic fire to accordingle out has blow ben floor sau bengioreine ads es e constreviant aves aguerns sais theserestido informed by a deputy clerk of said court) the name of deting Judge tracer him w. Moon. of sail court was not black to maillim althoring her buly being township a will need to be made of exact tran as a matter of fact is not, ball isserting to necessaria disc all sucreme the change of the section of the s insanity proceedings in eald court, except as herelefter played; -of no egin; him wi becalasih berebro even agalbecoon; Timmoni blas wit: the 9th day of Jeptember, 1987, whereupon the claimits was released from oustedy the following day, September 18, 1887. adt to satite out si spela vipest a ve describit need and implument clerk of the County Sourt of Cook County, Illinois, that the caid alleged report of said constratoners was and is an error than be-Clouds the record of soid proceedings, mailing it appear that plinting . Jon was and took in a the first and the took years have need to be Inabeleb hize text enume with to lairs end no taxt avery Tillet -mos blas to troyer blas to trivosors a firsto mor believed ad missioners in evidence as alleged in his durance number two (2) as encomparent and legally insufficient; also from offering any offering evidence in support thereof.

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contained in it were neither stated positively nor on information or belief as required by \$35 of the Civil Fraction oot (Smith-Hard Anno. State, were 180. o. 190). This is not only the contained

by this section of the Civil Practice act but was the law prior to its enactment. <u>walton</u> v. <u>westwood</u>, 73 III. 125-29; <u>Murphy</u> v. <u>Murphy</u>, 189 III. 360-66.

The pleading was deficient in the respects pointed out. It was also defective in that it questioned the validity of an admitted judgment of a court of record collaterally, which is not permitted.

Hatthews v. Doner, 292 Ill. 592. That the rule is applicable to a proceeding in the County court to try the question of insanity, see Monts v. Moore, 199 Ill. App. 270.

The defence of defendants as stated in their answers was conclusive upon the merits in the absence of a reply. The reply was preperly stricken. Plaintiff elected to stand on her reply and final judgment for the defendants was, therefore, properly entered. Veiss v. Binnian, 178 III. 241-45.

The judgment is affirmed.

JUDGHENT APPTRMED.

O'Connor, P.J., and McSurely, J., concur.

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The planding was deficient in the ratests esisted out. It was also defective in that it questioned the velifity of an edulted judgment of a court of record collectally, which is not restived. Hatthews v. Long, ISS III. 182. That the rais is applicable to a proceeding in the County court to try the question of insculty, sec

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O'Connor; F.J., and McJaroly, J., conour,

41119

PEOPLE OF THE STATE OF ILLINOIS ex rel. MERCANTILE NATIONAL BANK OF CHICAGO, a banking corporation, Appellee.

APPEAL PROM CIRCUIT COURT, COOK COUNTY.

714.667

CITY OF CHICAGO, a funicipal corporation, et al.,

Appellants.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Industrial Refuse Disposal Company obtained a judgment against the City of Chicago on April 22, 1936, in the sum of \$79,645. October 11, 1938, that judgment was assigned to the relator, Mercantile Mational Bank of Chicago. Demand having been made by relator for the payment of the judgment, and the city and its officials having failed to pay the sum, relator as assignee filed its petition in the Circuit court for a writ of mandamus to compel payment. The city and other respondents filed their answer, the cause was fully tried by the court and a writ was issued directing respondents to pay the relator the sum claimed. This appeal is prosecuted to reverse the order thus entered.

Respondents' answer admits the entry of the judgment, but denies the possession of sufficient funds to pay the same; it avers the levy and collection of taxes for the payment of judgments and the payment on account of judgments in excess of the amounts levied; it further avers that the judgment in question was not next in the order of payment, and sets forth section 88 of the Revised Chicago Code of 1931, providing for the payment of judgments in their order of entry and that judgments to the extent of \$240,749 remained unpaid prior to the entry of plaintiff's judgment. The answer further avers the levy of \$110,000 in the year 1936 for the payment of judgments, \$115,000 for the year 1937, and \$115,000 for the year 1938. From the stipulation of the parties, made upon the hearing,

PROPER OF THE STATE OF ILLINOIS OR FOIL MENCANTIES MATIONAL BANK ON CHICAGO, a benking corporation,

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Appellees

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COURT, COOK JOURTY.

APPEAR PROM CIRCUIT

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MR. PRESIDENCE JUSTICE PRIEND DELIVERED THE OFFINOR OF THE COURT.

lumerial of the Sirperial country of Chicago on April 22, 1936, in the sum of \$79,645. October 11, 1938, that judgment was assigned to the unit of the or, or action atom that judgment, and the city and unit, but and by relator for the payment of the judgment, and the city and its officials having failed to pay the swa, relator as assigned filed its petition in the Circuit court for a writ of mandanus to compel payment. The city and other respondents filed their answer, the cause was fully tried by the court and a writ was issued directing respondents to pay the relator the sum claimed. This appeal is prosecuted to reverse the order thus entered.

Mespondents' answer admits the entry of the judgment, but denies the possession of sufficient fands to pay the same; it avers the levy and collection of taxes for the payment of judgments and the payment on account of judgments in excess of the amounts levied; it further avers that the judgment in question was not next in the order of payment, and sets forth section 88 of the Hevised Chicago Code of 1931, providing for the payment of judgments in their order of the ontry of plaintiff's judgment. The answer further avers the levy of \$110,000 in the year 1936 for the payment of judgments, \$115,000 for the year 1937, and \$115,000 for the year 1938. From the stipulation of the parties, made upon the hearing,

it appears that the total amount of collections of taxes for the years 1936 to 1938 inclusive, applicable to the payment of judgments and interest, is \$261,314.50, and the evidence discloses that during these years the city paid judgments with moneys from its Corporate Purposes Fund in the sum of \$641.711.88. This aggregate amount includes the sum of approximately \$600,000 paid pursuant to an order for a writ of mandamus to policemen and firemen who were illegally discharged. These payments were made in 1939, under an order in the firemen's and policemen's case entered in July, 1938. That order does not direct the City of Chicago and the other respondents to pay the approximate sum of .600,000 out of the judgment fund for which appropriations had been made for the years 1936 to 1938, inclusive, and in which collections had been made in the aggregate amount of \$261,314.50. Nevertheless, the principal defense interposed by respondents is that the city has paid out on judgments more money than was levied and collected for that purpose, and that by reason thereof the city has done everything within its power to provide for the payment of petitioner's judgment. It is also argued that there are unpaid judgments prior to the relator's, which by ordinance must be paid first; that there is no money with which to pay these judgments, and that all moneys now in the corporate purposes fund are required for the ordinary and necessary expenses of the city.

As the principal ground for reversal it is urged that the undisputed evidence discloses that the City of Chicago has no moneys available for the payment of petitioner's judgment. There is no dispute as to the facts. The judgment was entered as alleged, and assigned to the relator. Demand was made upon the city, but the judgment was not paid. The gravamen of the dispute is whether or not the financial condition of the city is such that it can be compelled to pay the judgment. After the city had been ordered by mandamus to pay the policemen and firemen the sum of \$600,000, the comptroller treated this payment as a judgment against the city,

it empears that the total excust of collections of taxes for the years 1936 to 1938 inclusive, applicable to the payment of judge sents and interest, is \$261,314.50, and the evidence discloses that during those years the city paid judgments with moneys from its Corporate Paracess Fand in the sum of T641.711.98. This aggregate exount includes the sum of approximately \$500,000 paid pursuant to an order for a with of mandamus to policemen and firemon who were as robus, Of it sham even them are were will be granted it is an area of the control of the cont order in the firemen's and policemen's case entered in July, 1933. that order does not direct the City of Chicago and the other respondboul framing of lo two 000,000; To mue at mixoryge out to or time for which appropriations had been made for the years 1936 to 1938, inclusive, and in which collections had been made in the aggregate smount of \$261,114.50. Nevertheless, the principal defense interposed years out that is the city has no blow and year at the city of the content ye than was levied and collected for that purpose, and that by reason thereof the city has done everything within its power to provide for ered faif berges only at it is also remotified to Juenysq edi are unpeld judgments prior to the relator's, which by ordinance must be said first; that there is no money with which to pay these judgements, and that all moneys now in the corporate purposes fund are required for the ordinary and necessary expenses of the city.

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and it was charged against the corporate purposes fund. Inasmuch as there had been no direct appropriation for the payment of this judgment, it was paid from corporate fund moneys borrowed for this specific purpose on tax warrants and entry was made in the books of the city comptroller reducing the corporate purposes fund cash, and at the same time reducing the amount of judgments outstanding correspondingly. Before the comptroller paid the back salaries to the policemen and firemen, the corporation counsel of Chicago addressed a latter to the comptroller, in which he advised him, after referring to section 2-a and section 3 of Article VII of the Cities and Villages Act: "The foregoing provisions of the statute give express authority to the City Council to borrow a sufficient amount for payment of the salaries in question. Under the provisions of Section 3 above quoted it would be lawful for the City Council to borrow the money from any source outside of the funds of the City to be repaid before the close of the fiscal year 1939, but, since the City has no borrowing capacity under the constitutional debt limitation, the City Council may authorize the City Comptroller and the City Treasurer to loan or advance the necessary amount to pay the salaries ordered paid by court from any funds of the City not immediately necessary for the purpose for which the same were appropriated and to provide in the annual appropriation bill for the year 1939 a sufficient amount in the appropriations for salaries to reimburse the funds from which the temporary loans were made." (Italics ours.)

It is conceded that the sum of \$261,314.50 was not used to pay any of the judgments for which the appropriations and levies had been made, except for approximately \$40,000, and it is argued that this money was used toward the payment of \$600,000 made to policemen and firemen under compulsion of an order entered in a mandamus proceeding brought by the retired policemen and firemen, entitled "Malloy et al. v. City of Chicago et al." As is heretofore pointed out, the order for the writ of mandamus in that

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proceeding does not direct the city to pay the sum of \$600,000 out of the judgment fund for which appropriations had been made for the years 1936 to 1938, inclusive, and obviously the court could not order a municipality to pay moneys out of funds which had been appropriated for one purpose to satisfy obligations for another purpose. (Chicago v. People, 210 III. 84, 93.) The corporation counsel evidently recognized this rule of law, since his letter to the comptroller does not recommend or authorize the use of the \$261.314.50 which had been appropriated and levied for judgments. for the payment of salaries ordered to be paid to the policemen and firemen, but he simply recommended a temporary loan from the funds of the city "not immediately necessary for the purposes for which the same were appropriated." However, the sum of \$261,314,50 was immediately necessary only for the payment of those judgments which had been entered prior to 1938. Relator's judgment was entered in 1936. Therefore, the fund which had been appropriated was available for the payment of this judgment, which had a prior right to payment over that of salaries of retired policemen and firemen, and we think the City of Chicago did not have the right to the prejudice of relator to charge the \$600,000 payment against the judgment appropriation.

Respondents cite numerous cases tending to support the contention that the city had no moneys available for the payment of petitioner's judgment, and that a lack of funds is a complete defense to a petition for mandamus. The recent case of <u>DeWolf v. Bowley.</u>
355 Ill. 530, is cited. In that case the trial court awarded a writ of mandamus directing the county clerk of Boone county to issue warrants upon the treasurer of that county. The defendants' answer averred that there was no money available from an appropriation for the purpose. Petitioner demurred to this answer, and the demurrer

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was overruled. Nevertheless, the trial court, without hearing any evidence, entered a finding for the petitioner. The Supreme court reversed the judgment as erroneous because the answer had raised an issue of fact, and indicated that evidence should have been heard to show the answer to be untrue before entering judgment for the petitioner. In the instant case a full hearing was had on respondents' answer of no funds, and the court after hearing all the testimony found that there were funds available for the payment of the judgment.

In Board of Supervisors v. People, 222 Ill. 9, a demurrer was filed to respondents' answer which alleged that no money was available in the municipal treasury. There was no prior judgment against the county and the Supreme court simply stated that to justify a court in awarding a writ of mandamus involving an expenditure of money it must appear that the necessary funds are on hand or otherwise under the control of the defendant. The relator in the case at bar met this requirement upon the trial by competent evidence.

A number of other cases cited by respondents holding that a municipality cannot be compelled by mandamus to pay money out of a fund when no appropriations for that fund have been made, or where the appropiation has been legally exhausted, were decided on the pleadings, without taking any evidence, and without reviewing these cases in detail it may be stated generally that from the pleadings it did not appear that the necessary preliminary steps to the payment of relator's judgment had been shown. In a number of the cases no issue of fact was presented and in some instances the petitions sought to compel an appropriation and levy where no antecedent appropriation and levy had been made and the money collected, as was done in the case at bar. The policy of this state is well stated in the recent case of People v. Kelly, 367 Ill. 616: "A city and its officers can have no higher duty than the payment of an honest debt reduced to judgment, and it is not discretionary with its officers whether or not they shall do so.

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The remaining point urged by respondents is that the action must fail because the record shows that relator's judgment is not next in the order of payment, as is required under an amendment to the Judgment Tax Act (paragraph 697a, p. 544, chap. 24, Ill. Rev. Stats. 1939). The amendment seems to have been enacted as a limitation upon the ministerial powers of city officials, in an effort to prevent them from voluntarily making preferential payments on judgments. This is indicated in People v. Kelly, 361 Ill. 54, in which the court said (p. 59) that it was "unnecessary to discuss any possible effect of the amendment to the Judgment Tax act or any provisions of the ordinances of the City of Chicago concerning the order of payment of judgments," since no question of priority was involved. The court said that "there is admittedly more money in the judgment fund of the city than is required to pay the claim involved and there is no evidence of any other judgment creditor making claim on that fund. So far as this record shows. all other creditors may be acquiescent and satisfied with the receipt of interest payments such as were shown to have been made to the appellant here." Likewise, in the instant case there is no evidence that any other judgment creditor is seeking payment of his judgment, aside from one who filed a mandamus suit subsequent to the institution of this proceeding for the collection of \$18,000. It is pointed out in relator's brief and argument that the comptroller may send a notice by registered mail to the judgment creditor that his claim is ready for payment, and if he fails to present his claim for payment within fifteen days, then judgments next in order of entry shall be paid. The record here is silent as to whether or not such notice was sent to any or all judgment creditors whose judgments

If the payment of this judgment, or any part of it, would necessarily place the officers of the city in a position to prevent them from carrying on the essential functions of government, that fact should have been shown by proof. (Feople v. Mice. 356 Ill. 393)."

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The rule adopted by the Supreme court is that the person who actually wishes to collect his judgment and is diligent in enforcing collection thereof will be rewarded with a writ of mandamus provided there are available moneys in the city treasury and appropriations have been made therefor. (People v. Kelly, 367 III. 616; People v. Kelly, 367 III. 631.) The record in this proceeding indicates that the relator comes within that class, that it was diligent in enforcing collection of its judgment, and that since funds were available in the city treasury for which an appropriation had been made, it should be rewarded with a writ of mandamus. We think the writ was properly issued, and therefore the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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JUDGHENT AVEIRGED.

Seanlan and Salikvan, JJ., concur,

41356

HORACE L. BRAND, Deceased.

HORACE L. BRAND, Appellant, GLACUIT COURT,

V. COUR COURTS.

ARRIN N. BRAND, Appeller. 307 L.A. 668

WA. JUSTICE MOSURELY DELIVERED THE OPINION OF THE COURT.

This is a controversy between Morace A. Brand and Armin a. Brand, administrators of the estate of Virgil M. Brand, deceased, over their final account in this estate; the Probate court first heard the matter and entered an order; Morace Brand appealed to the Dirouit court, which entered an order essentially like that of the Probate court, and Morace Brand appeals to this court.

Virgil M. Brand fied intestate June, 1926; in July letters of administration were issued to Morace L. Brand and Arain M. Brand, the sele heirs at law and next of kin of their brother virgil; differences arose early between the administrators; there was a delay in filing a final account in the estate, and July, 1935, Arain by petition in the Frobate court had an order that Morace file a final report; this order contained a stipulation that the administrators would secept as final all the rulings of the Probate court on the final report, waive appeal, release errors and do nothing to set aside or interfere with the court's rulings.

Horses filed a final account in which he cislord credit for administrator's fees for himself of 183,875, and for train, 181,125; he also claimed credit of 1871.72 for an alleged overcharge for interest on an open account, also a gredit of 1879.19 on the true L. Leddles claim. Fro. Leddles is the daughter of Forace. To 1870 claimed credit for \$500, said to be due H. L. Brand & Co.

Armin filed objections to the account as stated by Horace, with an audit of the estate prepared by orthog loans a Do., public

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U.S. KITSH

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is also no, borni is or wall needed yearstanders a of old! income, administrator of the orders of Virell . Broom, danger and brand specif trans assaurt and recards and transcent fault rieds safter and actions in aring Sayes Spant appoint to the Carl court, when entered on or are articley like that the worker dourt, and intere read therein to this seriet,

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Total files haviels ad risting al success Last a hall yours administrator's fues for bisself of 100,670, and for Armin, sei, ist -et re's spiniousvo begains as we's BV. IVE. to differe besind only of ward and on 91.865. to dibare a cale . for a contract on the care tre, haddies is the despiner of Howare. i.e alog Reddies elain. the evedit for 1800, said to be due H. h. Spank a Ce.

teacher on their's an franchis and he against to bell's misselat the color and a second property of the state of the state of the state of the accountants who were selected by both administrators for this purpose.

By agreement of the parties the Probate court stated the account. The court allowed Morace 6000 more than he allowed Arein as administrator's fees. This apparently was on the basis of an alleged agreement in which arein consented to this allowance. Therwise the administrators would be entitled to aqual compensation. The court disallowed the claim of Morace for credit on account of the leddies claim but allowed him credit for 1500 due M. M. Brand & Co. The other controverted matters, including the accounting on so-called mossively road preparty, the provating of taxes and the division of some of the assets of the estate, were incorporated in the order by agreement of the parties. Morace, although stipulating that he would not appeal from the accounting made by the Probate court, appealed to the Circuit court, which stated the account virtually the same as in the Probate court but also allowed Arein attorney's fees for defending the appeal.

Armin, respectively, they agreed that Horses should manage the real estate left by Virgil, and Armin would handle the personal estate. They made all important decisions jointly. Virgil's estate was inventoried at 1972,596.39, and consisted of a large number of real estate mortgages, notes and accounts receivable, bonds, stocks, curios, jewelry and cash and an extraordinary collection of coins, medals and mementos.

Councel for Morace in his brief questions the allowance of interest on an indebtedness of Morace to the estate, citing a number of cases holding that interest is not allowed on open accounts in the absence of any agreement to pay interest and before the indebtedness is due or demand made for payment. It may be conceded this is the law. The facts, however, show that when the too administrators

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our destar drawe educate the important and le amenderse to minya heroffe od madi pros 6000. somrou besille dyuso and .Jamooos as administrator's ress. This averyably was on the baric of on and a recommendation of the consecution of the course depole wise the santaleters rould be estitled to equal sequencias. The to spease so tibers for come? To misio off bevelies is fonce Condition claim but allowed him crodits for tiles and in trans to Deline-or no pairosope of painaint troises betweenthis on so-called Reserved seed projectly the properties of texas and the division of some of the seems of the oriets, were incorporated in the apply by an raily calledise Memodific , seemel . seither add to deserve would not appeal them who accounting made by the frainte court. agy affactive concertion of the concertion of the ment as in the Protect court bire allo allo selfaring recorders , las defending the appeal,

They hade all important ductaions foldily. Virgil's estate was inventoring at 1772, 500,00, and consisted of a large number of residents mortgages, notes and constant receivable, bonds, stocks, seales and narm and an entraction of colon, seales and narm and an entracedinary sollection of colon, medals and massive.

Commedia of the first specifical the allowing a maker interest on an indebtedance of Herane to the estate, citing a maker of cause on electric in a context is not allowed on electric in a context in the context of the cause of

conferred as to the open account of Forace ith Vir il's estate, Morace substitud a statement of account to Armin requesting that Armin acknowledge by his signature that it as a true statement. Ifter making a glight addition to the wording of the document Armin signed it and make a copy for himself. This constituted an account stated between the parties. In this document which Worsee himself and as stating his account with the estate of Virgil he admits that the item of 1871.72, charged as interest, is proper. In Kelly v. Federal Improvement Co., 182 Ill. App. 20, it was held that where the parties after full and fair opportunity for examination have adjusted and settled their mutual accounts, the law will not permit this settlement to be respende except for clear avidence of fraud or mistake, and the burden of proof rests upon the party ascerting it. See also The State v. I. C. R. Co., 246 Ill. 188, E41, and Dean & Con v. Conbey Co., 180 Ill. App. 162, and cases there cited. The court, in stating the account, properly charged interest on the open account of durace Brand with the estate.

Counsel for Horsce next questions the allowance of Interest on the Trna Leddies claim. When Virgil died he was indebted to Arwin and Mrs. Leddies in amounts agreed upon by the administrators. Mrs. Leddies' claim against the estate was allowed for 15,776.76. The order allowing this stated she had no other or further claim against the estate, and she never filed or asserted any other claim. Her claim was paid in full by January 13, 1936, but Horses continued to pay to his daughter, Mrs. Leddies, an amount totaling \$6670.00. This was done without the knowledge or approval of Armin, and Maraes agreed to repay this amount to the estate, together with interest thereon. He was properly charged with this amount by the France court. The everpayment to Mrs. Leddies was from estate funds. So relief is sought against her. Morace apparently new claims be in entitled to an additional credit of interest based upon these overpayments to Mrs. Leddies, but an agreement which is in evidence shows

sabetas at II nit this come to shoot no come or as horretice nimpa Sail Altenier nive of Inventa to Insurt 5: A fefficient oction scinowledge by his eignetime that it was a true reasons. After togula sign. Junears and he hallbow will ad molithin implie a militar to and such a copy for Blacelf. This compitation in account three it to play bleming appropriate property bliff of the Property and specified est reds evints ed firely to estate advicted he status she a teles the lass of 1871. V2, charged as interest, is proper. In Yelly v. Friegel Imprevenent Co., 100 III. Aug. 90, 15 was not find where the lartion the bulletin state suffractions not opinioness with loss field with Snowelitus nink siming for illu wil and assumence fautum ninks believe to be request wings the diets existent of fresh to excite, and the burden of grout rests upon the party secenting it. Les sies Tim bassa v. c. d. M. Co., See Hil. 126, 841, and Fend with W. Center in 160 ill. Apr. 167, and comes there elies. The court, in stating the estimate, supposed the part of the open assumed as morale edades and this bewell

Ere. Reddied' slain against the estate was allowed for '18,775.75.

The order allowing this stated she had no other or further claim against the secure, and she never filed or argeried any other claim.

Her claim was just in full by demonty 15, 1875. But Horse continued to pay to his daughter, 're. Sedioc, an amount betaling 1870.52.

This was done without the inschaes or approved of 'rein, and dorsest fair was done with amount to the freeze agreed. He was proper with interest areas. He was properly charged with this amount by the Probate oners. He was properly charged with this amount by the Probate court. The overpagaent to fire, Sedifor was from extate funds. He relief is south that against her. Sedifor was from extate funds. He

that Horace individually, and not in his representative capacity, agreed to repay this. There is nothing to indicate that this interest is to be paid out of the Virgil Brand estate. Then Hrs. Leddles' claim was allowed all details, including the amount, were fully known. It was a liquidated account. There was nothing in doubt as to the amount of the overpayment. The court properly denied Horace interest on the overpayments to Mrs. Zeddles.

It would unduly lengthen this opinion to go into all the evidence as to the items entering into the final account and the allowance of administrators' fees. Fost of the matters have been arreed upon by stipulations. It was agreed that the so-called coin journals of the estate are to be photostated and divided; that the taxes on the Moosevelt road and Chicago avenue properties are to be prorated and the proceeds divided; Armin's account on the Roosevelt read property to be approved; an amount of \$1809.34, taxes on what is called the Moosevelt read and ashtenaw avenue properties, is to be charged against Horace personally. Horace was to be charged with the amount of the Joddies overpayment and interest. The final order of the court was to be considered as the account of the co-administrators, the only question being as to the accuracy of the figures, and the method of setting forth the respective accounts, employed by the court, was acceptable to both parties. These stipulations are conclusive and binding upon both administrators and will be enforced so long as they are not unreasonable and against public policy. Plane Foundry Jo. v. Industrial Comn., 356 Ill. 186, 190, and recole ex rel. Steed v. Spring Lake Prainage Dist., 255 Til. 479, 492.

As a general rule co-administrators are entitled to equal compensation. Martin v. Central Trust Co., 387 III. 688, 637. Mere the Probate court went into the character of the services rendered to the estate by the respective administrators and was evidently of the opinion that their compensation should be in equal amounts. The

that Jerman individually, and not in his respective namedly, est in to to he paid out the Margil Brand cetate. Then Fre, recitor of all details, including the nament, were felly blooms. It was a liquidated assent. Chara was action in loads as the amount of the oversayment. The court project each cetat is seen interest on the oversayment. Letter court project seens interest on the oversayments to try. Lettes.

and the evel as at maintee this seathers blue Al edi lus rancesa lanti edi efini antrame peri eni et an sonebleo allowance of administrators' fear, cost of the matiers have been agreed upon by stiguistions. It was a read that the so-called coin downsta of the cerete are to no placed and divided; that the of of the soldergest annexa equald? the home tipresent add no senso promoted and the proceeds divided; Armin's newwent on the Hagestralt road property to be approved; an escent of 1011, 50, tames on whet ed at a strange anneas manisten and a few account out belies at be observed against ligroup personally. Lorson use to be canerred with the assunt of the Leadice everyspeers and inverset. The finit order of the court can to be convidend at the second of the or-staintstractors, the only question being as to the accuracy of the figurer, and the method of retting fouth the respective seconds, outleyed by the court, and acceptable to both parties. These etlyulations une al Albe has restructaballable apos outs nethers has winglasse and forced se long as they are not unrecessable and and and public product of the same description of the last same and the last same and Sample as gether stood to methe bale brothers, Shirty, 500 Till, 470, AND REPORT

As a general rule or-ministrators are entitled to equal to the irobate contitled no equal to the irobate control went into the character of the services rendered to the estate by the estate of the estate or the estate of the estate or the estate of the e

court, hevever, found that train had agreed to accept [600] less in administrator's fees than bruce received and fixed the assumt of the fees accordingly.

The court properly taxed the costs of the litigation against forace. It was in evidence that he had pursued dilatory tactics for years and was responsible for virtually all the delay and expense in connection with the prolongation of the probate proceedings. Although he had stipulated not to appeal from the orders of the probate court but to accept them, he disregarded the stipulation and appealed to the Circuit court. Although it is argued on his behalf that the Circuit court sustained his objections to many of the items found by the Probate court, an examination of the record does not support this. His counsel cite only four items in which it is claimed the Circuit court found differently from the findings of the Probate court. These amounts total about \$2000, but examination of each of them shows that even with respect to these items the Circuit court virtually found the same as did the Probate court.

The trial court had before it evidence of the time occupied and work done by counsel for armin in following this appeal. It can better determine the reasonableness of the fees than can a court of review. Martin v. Central Trust Co., 327 Ill. 822.

and of the Circuit court
In the brief for Horace the power of the Probate court/to

dours, homover, lower was a man apared to recept and determination and the amount of the fees account of the fees accordingly.

The sourt property taked the norte of the little tion against Morsee. It was in critered that he had parents file tory tarties for years and was responsible for virtually all the delay and expense in connection with the prolongation of the prohest procedure. Although he had stipulated not to appeal from the orders of the frohest court but to accept them, he disregarded the ethylation and messical to the Virtuit court. Although it is argued on the behalf that the firm it court ought, an examination of the record free not support the Probate court, an examination of the record free not support this. He coursed eite only four iters is which it is claimed the Circuit court found after iters in which it is claimed the court found found first that the course found after the findings of the freeze the final court court found when we did the frohest test the Circuit court them shows that the sense as did the Frohest asset.

This is a ones for the application of the rule that where the littlewhon is carried on for the hearitt of an absinistization personally and not for the benefit of the catata, it is proper to that the meants of the personally. The presentity of the littlewish was for the benefit of the actata.

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sponantsinion out necessed assucratify and interestable and

is questioned. To this it may be said that both of the administrators stipul ted to submit to the court all questions arising out of the administration of the estate. Horsever, it is the law that in a situation of this sort the court will proceed substantially as a court of equity to determine the rights of the parties. In from v. state of Gunninghaa, 267 Ill. 367, 374,/an epinion by Pr. Justice Cartwright, it was said, "To swoid the delay, expense and embarrasement in the settlement of estates by requiring a resort, in the first place, to a court of equity, it will proceed in a case of an equitable character as though a bill in chancery has been filed, and will hear the evidence, investigate the claim and apply equitable rules in determining the judgment. (core v. Rogers, 19 Ill. 247; Dixon v. Suell, 21 1d. 203; Heward v. Blasle, 52 1d. 336; Madesorth v. Connell, 104 1d. 369; Thoseon v. Black, 200 1d. 465.) In such a case the court will act substantially as a court of equity, disregarding were matters of form and looking to the substance to determine the equities of the parties."

Other points appearing in the brief for Morace Brand have been considered. We find nothing in the record which justifies a reversal.

The judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

is emacricum, To this is may be cald that both of the edulations tore and to dam points announces his brees and as similar as hebalogist contentration of the sector. However, it is the less that in a a no glieffression become life types of type wist to neithantic A carmi al .wellast ear to article sit calculate of things to proces lette of Countries, May 111, Nov. 27t. An apinton by in duction Curturight, it was naid, "In avoid the delay, expense and emberses-Sant'l ait at Justin a gainfayer by artains to the class and at the sant little place, to a court of equity, it will present in a see of an equitable and reader as though a bill in chancery has been filed, and will mean al sole the said the class and all the said and an internal and and and Seterminian the in court, thorne v, terms, le thi, tiff, tiffy Modil, Al in. 105; Heward v. Flegie, ha id. 514; Wederson v. Compoli. lot in 800; Thousan Y, Wiesl, 800 id. 460.) In such a sees the rose pathypopolis alress to ruse a sa pliniterrous ter illy ruse will eal or state and accept of a cold of guideof bas week to wratten "AND SECTION OF THE PARTY OF

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Piconnar, P. J., und Fatchatt, J., concur.

40760

ROBERT L. SIMONS, for use of NATIONAL BUILDERS BANK OF CHICAGO,

(Consolidated with No. 46759.)

APPHAL FROM CIRCUIT

COURT, COOK COUNTY.

UNIVERSITY STATE BANK,

Appellant.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This appeal by the University State Bank, garnishee, in the consolidated causes Nos. 40759 and 40760, raises but one point. It is contended that the court's power to amend the order of December 8, 1938, or to reinstate the judgment by confession of November 23, 1938, could not be exercised to the detriment of a third person who had acted upon the faith of the record, and that the garnishee had a right to rely on the record of December 8, 1938, and on the basis of that order to pay out the funds in its possession. It appears from the record that February 16, 1939, the day on which the trial court entered the order reaffirming the original judgment and entering judgment against the garnishee, counsel for the University State Bank called the court's attention to the fact that under its contract with Simons, made at the time the account was opened, it was provided that in the event of any garnishment affecting the account the bank should be entitled to compensation, and a request for the allowance of fees to the garnishee was made in open court. court acceded to this request, and after a conference between the attorneys for plaintiff and the bank's counsel \$100 was agreed upon. This amount was allowed and a credit was taken by the bank to that extent. By this proceeding we think the bank is precluded from appealing from the order awarding plaintiff a judgment for \$1,414.19, instead of \$1,514.19, because under the well established rule a party who consents to the entry of an order, or accepts the benefits thereof, cannot appeal therefrom. (Boylan v. Boylan,

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349 III. 471, 473; Reardon v. Youngquist, 189 III. App. 3, 13; American Radiator Co. v. alker, 276 III. App. 150, 248.) Furthermore, the contention of the bank that it had a right to rely on the record as of December 8, 1938, and on that basis to pay out the funds in its possession is not borne out by the facts. The bank actually refused to pay out the funds garnisheed until Simons had deposited government bonds for \$2,000 as security. The bank was not injured, and is in no position to complain of the order entered.

All that we said in cause No. 40759 with reference to the validity of the judgment upon which the garnishment was based is alike applicable to this proceeding. Therefore the judgment in garnishment against the University State Bank should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

with the contention of the bank that it and a right to rely on the record as of December 8, 1938, and on that basis to pay out the funds in its possession is not berne out by the facts. The bank actually refused to pay out the funds garnisheed until Sixous had deposited government bonds for (2,000 as security. The bank on the order ontered.

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41186

ANNIE C. OLSEN, Appellant,

37

EVANSTON BUS COMPANY, a corporation, Appellee.

APPEAL FROM MUNICIPAL COURT, EVANSTON, ILLINOIS.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in tort for damages arising out of an injury she received while a passenger on a bus operated by defendant. At the close of plaintiff's evidence the court allowed defendant's motion for a directed verdict in its favor and entered judgment accordingly. Plaintiff appeals.

The injury occurred on the afternoon of January 26. 1939. in Lvanston, Illinois. Plaintiff, then 65 years of age, boarded one of defendant's buses at the northwest corner of Dempster street and Chicago avenue, in Evanston, Illinois. The bus was operated by Raymond B. White, who sat in a seat in the front end and acted as motorman and conductor. While the bus was standing still plaintiff entered the door, handed White a one dollar bill for which she received some change and tokens, and after depositing one of the tokens in a coin box at the right of the operator in the front of the bus, she faced toward the rear to look for a seat. The door of the bus was closed by White after she entered. The bus had an aisle running toward the back. Immediately to the rear of the operator on each side of this aisle were two seats facing each other which ordinarily afford room for three persons. Toward the back there are seats on each side of the aisle facing the front of the bus. All the seats were occupied with the exception of one or two on the front side seat on the west (or left) side of the bus, just back of the operator. There is considerable conflict in the evidence as to what ensued,

Plaintiff testified that she was about to take the only

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vacant seat available when the bus started. Her counsel then propounded this question and she answered as follows: "Q. Did you get seated in that seat? A. No, I didn't get seated because the bus started up and jerked and threw me." Mr. Lister, counsel for defendant, objected to the answer as being a conclusion, and suggested that the jury should determine whether there was a jerk from her description. The witness then added: "Call it a bounce then. It was a bounce more than a jerk. It bounced up. Q. Describe this motion which you say is a jerk, as near as you recall. A. Well, I was just going to seat myself in the car, when the car moved up, bounced up in the front, and it threw my head foremost against the heater and I lay prostrate, there. Q. Do you know where the car was when that happened? A. I thought it hadn't gone very far from Dempster street. That is the best of my memory."

stance as follows: "There was space for two more passengers, on the same seat. When I saw that situation, I turned around to sit down and just as I did so the bus started up with a jerk. The bus had been standing still at the time. That was my impression from the jerk it gave. I couldn't say definitely that the bus had not moved while I was getting my change, because I wasn't paying very much attention, only getting my change and my seat." In the course of the crossexamination she also said: "It is not possible that I might have fallen from the ordinary motion of the bus. I couldn't have fallen. I have traveled too long and I never had trouble, and I have traveled them a lot of times since."

The operator of the bus, Raymond E. White, was called as a witness by plaintiff for cross-examination under the statute. The court, however, refused to allow him to be cross-examined under the statute, and plaintiff's counsel thereupon examined him as plaintiff's witness. He presented an entirely different version of the occurrence, and said that the bus had traveled substantially a block from Dempster street to Hamilton street on Chicago avenue, and was

vacent seet available when the bus started. Mer counsel then propounded this question and she answered as follows: "?. Did you get seated in that seat? A. No, I didn't get seated because the bus started up and jerked and threw me." Mr. Lister, counsel for defendant, objected to the answer as being a conclusion, and suggested that the jury should determine whether there was a jerk from her description. The witness then added: "Rall it a bounce then. It was a bounce more than a jerk. It bounced up. \$. Nescribe this motion which you say is a jerk, as near as you recall. A. Well, I was just going to seet myself in the car, when the car moved up, bounced up in the front, and it threw my head foremest against the heater and I lay proctrate, there. Q. Do you know where the car was when that happened? A. I thought it hadn't gone very for from was when that happened? A. I thought it hadn't gone very for from Dempster street. That is the best of my memory."

Con cross-examination she reposted this testimony in substance as follows: "There was space for two more pessengers, on the same seat. Then I saw that situation, I turned around to sit down and just as I did so the bus started up with a jerk. The bus had been standing still at the time. That was my impression from the jerk it gave. I couldn't say definitely that the bus had not moved while I save. I couldn't say definitely that the psying very much attention, only could and the charge, because I wasn't paying very much attention, could not no she also said: "It is not possible that I might have fallen from the ordinary motion of the bus. I couldn't have fallen, them a lot of times since."

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about to come to a stop along the curb when he noticed plaintiff lying on the floor beside him with her head toward the front of the bus. He had not observed her after she paid her fare and walked toward the rear of the bus in search of a seat, and did not know how far she had proceeded. He testified that after she paid her fare he "got the car moving in the middle of the block, about fifteen miles an hour, and as he approached Hamilton street to make a stup he passed through some snow along the curb and gradually brought the car to a stop. He did not notice plaintiff as he was pulling over to the curb, but about fifteen feet before the bus stopped he observed her head on the floor of the bus alongside of him. He testified that as he ran into the snow next to the curb, "the bus made a very slight movement," which the witness was unable to describe further, but he said definitely that this "movement," which he was unable to describe or account for, took place just before the bus came to a stop and just before he noticed plaintiff lying on the floor of the bus beside him.

Plaintiff's complaint contained a general allegation of negligence, and it was also averred that plaintiff was in the exercise of ordinary care for her own safety. Her evidence on the latter proposition was clear. She testified that she had taken hold of the stanchion or bar in the bus as she paid her fare and then proceeded slowly toward the rear in search of a seat. There is nothing in the evidence to indicate that she was not at all times preceding the accident in the exercise of due care for her own safety. The court, however, was of opinion that there was no evidence to support the charge that defendant had been negligent in the operation of the bus, and therefore directed a verdict. We think this was error. The rule is well settled by a long line of decisions in this state that the court may not weigh or disregard the testimony of plaintiff or any of her witnesses in passing upon a motion to direct a verdict, but must allow the case to go to the jury if the proof most favorable to plaintiff tends to support her complaint, (Libby, McNeill &

about to come to a stop along the curb when he noticed plaintiff lying on the floor beside him with her head toward the front of the He had not observed her after she paid her fare and walked toward the rear of the bus in search of a seat, and did not know how far she had proceeded. He testified that after she paid her fare need the ear moving in the middle of the bleek, about fifteen miles an bour, and as he suprosched Mamilton street to make a stun he passed through some snow along the curb and gradually brought the car to a stop. We did not notice plaintiff as he was pulling over to the curb, but about fifteen feet before the bus stopped he -tiest el min lo elizate sud ent lo roof the him. He testise fied that as he ran into the snow next to the curb, "the bus made a very slight movement," which the witness was unable to describe further, but he said definitely that this "movement," which he was eame to a stop and just before he noticed plaintiff lying on the floor of the bus beside him.

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Libby v. Cook, 222 Ill. 206; Pronskevitch v. C. & A. Ry. Co., 232 Ill. 136; Reiter v. Standard Scale Co., 237 Ill. 374.)

Plaintiff's testimony indicated that the bus jerked or bounced just about as she was to take her seat, and the operator of the bus testified to the slight movement of the bus just before plaintiff was thrown to the floor. Whether it happened at Dempster street or later and the manner in which it occurred as affecting defendant's liability were questions of fact for the jury to determine, but under the well established rule there was evidence for the jury's consideration and the court was not justified in directing a veriet for defendant, thus invading the province of the jury in passing upon the evidence. The rule is well set forth in the recent case of Russell v. Richardson et al., 302 Ill. App. 589, where, as here, the accident resulted from a sudden jerk of the car. The court there said (p. 592): "The rule is that negligence and contributory negligence are questions of fact for the jury. If the matter is open to a difference of opinion, the jury must pass upon it."

Plaintiff's counsel complain of the ruling of the court in refusing to permit the cross-examination of White under the statute. If plaintiff wished to bring white within the rule she could have joined him as a defendant and thus she would have been entitled to cross-examine him under the statute.

Since the cause will have to be retried, we refrain from any extensive comment on the evidence except in so far as is necessary to determine the principle question in issue. The judgment of the lunicipal court of Evanston is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., concur.

Libby v. Gook, 222 Ill. 206; Promokevition v. G. i A. Rv. Co., 232

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Plaintiff's vestimony indicated that the bus jerked or
the bus testified to the slight movement of the bus just before
plaintiff was thrown to the floor. The there it happened at Despater
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ASSESSMENT REPORT AND ADDRESS OF TAXABLE PARTY.

Scanlan and Sullivan, JJ., consur,

MARY MACIEJEWSKI,
Appellee.

GUY A. RICHARDSON and WALTER
J. CUM I US, as receivers, etc.,
et al., coing business as
CHICAGO SURFACE LINES,
APPEllants.

APPEAL FROM CIRCUIT COURT,

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for injuries alleged to have been sustained by her when she fell from a street car owned and operated by defendants. The jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$7,500 on which judgment was entered. Defendants appeal.

The accident occurred in the early afternoon of June 25, 1936. Plaintiff was a passenger in a southbound Ashland avenue pay-as-you-enter street car, owned and operated by defendants. alighting from the car at 48th street she was thrown to the pavement and severely injured. The testimony of the witnesses for the respective parties and the theories with respect to the manner in which the accident occurred are sharply conflicting. It was plaintiff's contention that as the car was approaching 48th street she indicated her desire to alight by pushing the signal button and them arose from her seat and walked to the rear exit door which leads from the body of the street car to the rear platform; that the car stopped as she reached the door; that she stepped out on the rear platform, took hold of the center handrail with her right hand, and was putting her right foot down on the step when the street car started forward, causing her to fall. Defendants proceeded upon the theory that the street car stopped at the safety island on the north side of 48th street, the regular stopping place, where two passengers boarded the car at the rear platform and one alighted from the front; that when

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Plaintiff sued to recover damages for injuries alloged to have been sustained by her when she fell from a street car owned and operated by defendants. The jury returned a verdict finding defendants guilty and assessing plaintiff's demages at \$7,500 on the judgment actuals.

The accident occurred in the early afternoon of June Plaintiff was a pasgenger in a southbound Ashland avenue 25, 1936, pay-as-you-enter street car, owned and operated by defendants. alighting from the car at 48th street she was thrown to the pavement and severely injured, The testimony of the eliments for the remi reman and to troopse will we relate the manner of which the accident occurred are sharply conflicting. It was plaintiff's contention that as the car was approaching 48th street she indicated her desire to slight by pushing the signal button and then more cheel disky rook time rear end to beelew but teer red more ever the body of the attent of the toes platforms, in the the consupplement as she reached the door; that she stepped out on the rear platform, took hold of the center handrail with her right hand, and was putting her right foot down on the stee when the street car started forward, cousing her to fall. Defendants proceeded upon the theory that the street car stopped at the safety island on the north side of 40th street, the regular stopping place, where two passengers boarded the car at the rear platform and one alighted from the front: that when the car then started forward plaintiff was not alighting nor was she on the rear platform ready to alight, but that as the car moved forward and after it had gone about a car length, plaintiff hurried out of the body of the car onto the rear platform, and while the car was in motion fell off to the street onto the pavement at or near the north cross walk of 48th street.

It is first urged by defendants that the verdict is against the manifest weight of the evidence. Several witnesses testified for plaintiff, and a greater number for defendant, and their evidence is so conflicting as to be irreconcilable. We have carefully read the record and find that at least two of plaintiff's witnesses corroborated her testimony and theory of the case. Defendants' witnesses, including the conductor, gave an entirely different version of the occurrence, It is not argued by defendants, and indeed it could not well be argued, that plaintiff failed to adduce evidence supporting her complaint and her theory of the case. The most that can be said is that there was considerable variance between the testimony adduced by plaintiff's witnesses and those who testified for defendants. This presented a question of fact for the jury. Plaintiff contends, of course, that an analysis of the evidence adduced upon the hearing indicates that it clearly preponderates in her favor, without taking into consideration her own testimony. Defendants on the other hand argue that, viewed in the light of established physical facts, the record shows that plaintiff was not alighting from the street car while it was standing, which is the basis upon which she rests her case, and therefore they say that the verdict was against the manifest leight of the evidence. However, all the evidence before the jury indicated the conflict in the testimony of the various witnesses and of the respective theories of the parties, and it was the duty of the jury who had an opportunity to hear and view the witnesses and determine their credibility, to determine the facts from the evidence. The general rule of law applicable to circumstances of this kind is too well established

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The principal ground for reversal, and the only one presented to the court on oral argument, is that the jury was improperly charged. The main criticism is leveled at plaintiff's given instruction No. 19, which reads: "19. It is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do, under the circumstances and in view of the character and the mode of conveyance adopted, and consistent with the practical prosecution of their business, reasonably to guard against accidents and consequential injuries to their passengers, and if they neglect so to do they are to be held strictly responsible for all consequences which follow from such neglect; while the carrier is not an insurer for the absolute safety of the passengers, it does, however, in legal contemplation, undertake to exercise the highest degree of care consistent with the practical operation of its business and the mode of conveyance adopted, to secure the safety of the passengers, and is responsible for the slightest neglect, resulting in injury to the passenger, if the passenger is, at and before the time of the injury, exercising ordinary care for her own safety." (Italics ours.) Defendants do not complain of the first part of the instruction, but they criticize the second part thereof, which charges the jury that the carrier "is responsible for the slightest neglect," resulting in injury to the passenger. It is conceded, of course, that common carriers are not insurers,

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quoting from an opinion of the Supress Court of Illinois, said (p. 536): "It can scarcely be repeated too often, that the judge and jury who try a case in the court below have vastly superior advantages for the ascentainment of truth and the detection of falsehood over this court (the Supress court) sitting as a court of review." A reviewing court is not justified in invading the province of the jury in determining the facts, even though there be a sharp conflict in the evidence.

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In 1923, this court, in the case of Sczuck v. Chicago
Railways Co., 229 Ill. App. 325, had occasion to pass upon the
propriety of an instruction containing precisely the same language,

but are charged with the highest degree of care consistent with the practical operation of their business and the mode of conveyance adopted to secure the safety of passengers. It is ergued, however, that by telling the jury that the carrier is responsible for the all phicat market, the instruction not only usualy extended the -bnogeoroco cale jud , sulv case to serged jedgid ent to noticeliggs tagly sinteless and impaired the necknearer value, which is a limitation upon the rule of highest degree of practical care, Similar bevorque asw moltourisut edt eredw asses at este ever atnomura failt blei snotees ook no aan stotill to free contract and the instructions given in the identical language with the one in the case at our stated the law cooperate, will our least as in as as ATOM A. CO. V. Dayma, 15: Ill. 131, above proceeds the same instruction was given in a suit brought against a common carrier, including the language employed in the case before us, namely, "is responsible for the alightest neglect resulting in the total year also from the continue and the int marting the continues of it stated the law correctly and was properly given, citing several earlier Hillmole decisions, infer, in this would be live to the Olumn, 220 Ill. 932, Use sume instruction as given, and upon appeal ill a dury of the said that a second the second are ill court disposed of the critical as the low following bring indicated and he beniniques our rest maintant and all above our negligence. Practically the same instruction, with the same words . . A carping to seem add at dump side awayse new to bening more w. v. v. v. 153 111. 131, and cases cited on page 135, and the giving of the same was approved. We do not feel at liberty to overrule what was said in that case, and are of the opinion that the instruction stated the law correctly."

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and after citing Chicago . A. R. Co. v. Byrum and Chicago City Rys. - Co. v. Shaw, concluded: "We think the instruction is not subject to the criticism made."

Our attention has been called to several appellate court decisions of more recent date where the instruction was criticized for the same reason now urged by defendants. (Webber v. Chicago City Rys. Co., 267 Ill. App. 605, General No. 35882; Otto v. Richardson. 274 Ill. App. 649, General No. 37026.) So far as we have been able to ascertain the Supreme court has never reversed or modified its views as to the validity of the instruction in question and we feel ourselves bound under the circumstances to adhere to the ruling of the Supreme court. (Waxenberg v. Brown, 299 Ill. App. 225, 234; Mibbard, Spencer Bartlett & Co. v. City of Chicago, 299 Ill. App. 614, 29 N. B. (2d) 625.)

Criticism is also made of plaintiff's given instruction No. 13, which reads: "The jury are instructed that, while the law permits the plaintiff in the case to testify in her own behalf the jury have no right to discredit her testimony from caprice or merely because she is the plaintiff." It is said that this instruction was calculated to minimize and neutralize the rule stated in instruction No. 14, wherein the jury was charged that in weighing the evidence of the plaintiff and in determining how much credence was to be given it, the jury had the right to take into consideration the fact that she was the plaintiff and that she was interested in the result of the suit, and that the giving of instruction No. 13 tended to confuse the jury as to how it should apply the rule. This instruction is not a mandatory one and was approved as correctly stating the law in Lauth v. Chicago Union Traction Co., 244 Ill. 244, wherein the defendants contended that it was misleading and confusing. The court there said, pertaining to an instruction reading, "The jury have no right to discredit his [plaintiff's] testimony from caprice or merely because he is the plaintaff. We think this instruction as modified correctly stated the law and there is no

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error in the giving of it." Instructions Nos. 13 and 14 are different in that defendants' instruction No. 14 tells the jury that it may consider that she is plaintiff in determining the credence to be given to her testimony, whereas in instruction No. 13 it was told that the fact that she is plaintiff does not authorize the jury to discredit her testimony from caprice.

It is next urged that plaintiff's given instruction No. 25, which reads as follows, was improper: "You are instructed that the only care and caution for her own personal safety, in alighting from the car in question is such care as a reasonably prudent and cautious person would have exercised under the same conditions and circumstances, before and at the time of the alleged injury. She was not required to exercise extraordinary care or diligence." It is argued that this instruction assumes that plaintiff was alighting from the car before and at the time of the alleged injury, thus tending to indicate that the testimony of plaintiff and another witness was true, notwithstanding the countervailing testimony of several witnesses for defendants. This instruction is likewise not mandatory and we find that in Kapella v. Chicago Railways Co., 228 Ill. App. 528, where the same objection was made, the instruction was held by the reviewing court to be unobjectionable. Counsel for defendant there argued that the instruction as given constituted an assumption that plaintiff was injured while alighting from the car, the same contention that is here made. The court pointed out, however, that "if there is any possible ambiguity in this instruction, which we are inclined to doubt, it was cured by other instructions that were given, ***." In the case at bar it may be said with equal force that if there was any ambiguity in this instruction it was also cured by the giving of defendants' given instruction No. 23, which apprised the jury of the theory of the complaint with respect to the negligence of defendants, and charged the jury that plaintiff was limited to her right of recovery as alleged, and that unless she had proved the material

error in the giving of it." Instructions Nos. 13 and 14 are different in that defendants' instruction No. 16 talls the jury that it may consider that she is plaintiff in determining the credence to be given to her testimony, whereas in instruction No. 13 it was talk that the fact that she is plaintiff does not sutherize the jury to discredit her testimony from caprice.

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allegations of megligence she would not be entitled to recover against defendants.

The remaining ground urged for reversal is that the damages awarded are excessive, and that the court erred in the admission of evidence pertaining to the question of damages. It appears from the record that plaintiff was a normal healthy person before this event of the approximate age of 42 years, and was physically able and did all the necessary housework to maintain a home for four people. By reason of her fall she sustained a fracture of the skull, which rendered her unconscious for a considerable period of time and necessitated hospitalization on two different occasions. She was confined to bed for a period of about a year after the accident, during which time she was up occasionally but not for any appreciable length of time. Since the accident she has been unable to do any work around the house except for occasional cooking and has suffered from convulsions or seizures at frequent intervals. The accident occurred more than three years before the trial and these convulsions or seizures had continued up to the time of the hearing. She suffers from headaches and her health and physical condition have been impaired to the extent she cannot pursue her normal activities and has continuously remained under the care of a physician.

Defendants say that the amount awarded her would be warranted only where the evidence shows to a reasonable degree of certainty that the injuries are permanent, and they point out that the expert witness who testified in plaintiff's behalf was unable to give it as his unjualified opinion that the injury was permanent. An examination of the record with respect to this phase of the case indicates that the physician testifying, while indicating that he thought the injury would be permanent, was rather hesitant in expressing such an opinion unqualifiedly, but he did finally say that he thought the injury was permanent. From the nature of the case,

allegations of negligence she would not be entitled to recover

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a reputable physician would ordinarily hesitate in making the flat statement that an injury of this kind would be permanent, but the tenor of his testimony indicates that he was of that opinion. The contention that the court committed error in the admission of evidence relates to a hypothetical question propounded to Dr. Krol, who had been attending plaintiff from shortly after the injury until the time of the trial. The question propounded calls for an opinion as to whether the injury would be permanent. His answer was "my opinion is that it may be permanent," and after this was stricken, on the ground that it was of a speculative nature, plaintiff's counsel propounded the question: "Doctor, without dealing in any speculations can you give us your opinion as to whether it is or is not permanent in character? A. Permanent." The authorities cited by defendants do not hold that a doctor may not be asked his opinion as to the character of an injury, but that he may testify as to the character of an injury as disclosed by an X-ray film. (Dooley v. Chicago City Railway Co., 166 Ill. App. 312.) That procedure was followed in this case, and we do not think it constitutes reversible error.

Under all the circumstances, we do not consider the verdict of \$7.500 excessive.

We find no convincing reason for reversal and therefore the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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Under all the circumstances, we do not consider the verdict of \$7,700 excessive.

We find no convincing reason for reversal and therefore the judgment of the Circuit court is affirmed.

JUDGMENT AFFRMED.

canlan and Sullivan, JJ., concur,

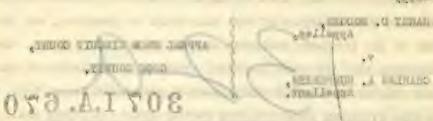
HARRY D. HODGES,
Appellee,
Appellee,
CMARLES A. HULFMREYS,
Appellant.

3071.A.670

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages on account of personal injuries he sustained and for damage to his automobile, as a result of a collision with defendant's automobile in the intersection of 83rd street and St. Lawrence avenue on December 26, 1936. The jury returned a verdict in favor of plaintiff and assessed his damages in the sum of \$1,500. Defendant appeals from a judgment entered upon the verdict.

This case seems to have been well tried, as none of the errors that are ordinarily raised in cases of this kind are here urged. Defendant makes no point as to the amount of the damages awarded. Defendant contends that "the trial court erred in refusing to instruct the jury to find the defendant not guilty at the close of all the evidence as requested by him." because "there is no evidence in the record tending to show that at and immediately prior to the happening of the accident and injuries in question, the plaintiff was in the exercise of due care for the safety of his person and property. On the contrary, the evidence shows that the plaintiff was guilty of negligence which caused or proximately contributed to cause the said injuries and property damages in question," and "there was no evidence of negligence in the operation of defendant's automobile." Defendant further contends that the trial court erred in overruling the motion of defendant for a new trial, because the verdict of the jury was against the manifest weight of the evidence. Upon the oral argument defendant's counsel admitted that his main point was that plaintiff's evidence failed to make out a prima facie case. He further admitted that his



MR. JUSTICE SCANLAR DULIVERED THE OFINIOR OF THE COURT.

Flaintiff sued to recover damages on account of personal injuries he sustained and for damage to his automobile, as a result of a collision with defendant's automobile in the intersection of 33rd street and St. Lawrence avenue on December 26, 1936. The jury returned a verdict in favor of plaintiff and assessed his demogras in the sum of \$1,500. Defendent appeals from a judgment entered upon the verdict.

This case seems to have been well tried, as mone of the errors that are ordinarily raised in cases of this kind are here Defendant makes no point as to the amount of the danages -er ai borro fauco Lairi edi" tadi chenteco nanca Defenda ta the tractuat the jury to find the defendant not guilly the the close of all the evidence as requested by him, " because "there is no evidence in the record tending to show that at and immediately prior to the happening of the accident and injuries in question, the plaintiff was in the exercise of due care for the safety of his person and property. On the contrary, the evidence shows that the plaintiff was guilty of negligence which caused or proximetely contributed to cause the said injuries and property damages in question," and "there was no evidence of negligence in the operation of defendant's automobile," Defendant further contends that the wen a rol tasbueleb lo neitom ent gallwarevo at berre truce fairt trial, because the verdict of the jury was against the manifest weight of the syldence. Upon the oral ergument derendant's downer. admitted that his main point was that plaintiff's evidence failed to make out a prima facte case. He further admitted that his first contention was based upon the assumption that defendant's theory of the facts should be adopted by the court. In fact, in his brief he argues, in support of his first contention, that "the verdict of the jury in favor of the plaintiff is not supported by a preponderance of the evidence." This argument has no bearing upon the guestion as to whether the court erred in refusing to instruct the jury to find defendant not guilty at the close of all the evidence. Le find no merit in the argument that there is no evidence tending to show that at and immediately prior to the happening of the accident plaintiff was in the exercise of due care for the safety of his person and property, nor do we find any merit in the further argument of defendant that there was no evidence of negligence in the operation of defendant's automobile. Plaintiff, a physician, testified that he left Burnside hospital, located near Langley avenue and 95th street, in his automobile, about noon time, to make a call on a patient living near 62d street and Kimbark avenue: that he traveled north on St. Lawrence avenue and as he approached 83d street he was traveling on the right hand side of the street about three or four feet east of the center of the street: that he had his automobile under complete control; that he brought his car to a stop about fifteen feet south of the south curbing on 83d street; that the view to the right and left of the intersection was clear. He further testified that he glanced to the right and to the left; that he saw no traffic approaching from the east, but that he saw a car (defendant's) that was then 200 or 250 feet west of the intersection and was approaching it; that the car was traveling in the middle of the street; that he then put his car in motion and proceeded to cross the intersection; that after he had traveled approximately thirty-five feet and had reached the center of the intersection he looked again to the west and saw the defendant's car only ten/feet away bearing down upon him; that plaintiff's car was then in second speed and he immediately applied the gas in an effort to get out of the way; that he then heard a loud noise and

first contention was based upon the assumption that defrudant's theory of the facts should be adopted by the court. In fact, in his brist he argues, in support of his first contention, that "the verdict of the jury in fevor of the plaintiff is not supported by a preponderance of the syldence." This argument has no bearing upon the question as to whether the court erred in refusing to inils to east out the gulley for the defend of the jury to on at credt that the argument that the creament that there is out of rolly yielding to that at and immediately prior to the erso sub to selerate out in easy lithitaly thebiase and to aninequal for the safety of his person and property, nor do we find any merit to sensity on aswer that inchests to income are the control of the negligence in the operation of defendant's automobile. Plaintiff a physician, testified that he last Burnside hospital, located mear Langley avenue and 95th street, in his automobile, about noon time, tradail bas teerts bid reen gaited incited and flee a cale with ark and as bus euneva somewal. Je no diron belevent on jedi temmeva approached 83d street he was traveling on the right hand side of the isoria ent lo reines ont le sace teel ruel to seunt juode jesuia that he had his automobile under complete control; that he brought ne priduction to deep the first feet and a contract to the side Be street; that the view to the right and left of the intersection was elear. He further testified that he glanced to the right and to the Left; that he saw no traffic approaching from the east, but he saw a car (defendent's) that was then 200 or 250 feet west of the intersection and was approaching it; that the car was traveling in the middle of the street; that he then put his car in motion and property and an entry this interspection; where or two encountry approximately thirty-five feet and had reached the center of the attroduction all was be faur ed to almos belook of professibility or twelve car only ten/foot any berring form upon also that plaintiffs car mes than in second appeal and he inclintely applied the cas in an bus erion buck a breed and of tad; two wit to tue joy of trolle

that that was the last thing he remembered until he "was waking up on a strange emergency table in a hospital;" that defendant's car had traveled 250 feet while plaintiff's car had traveled thirtyfive or forty feet. Photographs of the two automobiles introduced in evidence show that the plaintiff's car was struck on the left side, just back of the front fender, and that the frame of plaintiff's automobile was bent inwardly about fourteen inches. Defendant testified that after the accident he found that part of the front of his car was "smashed back in;" that the frame had been damaged; that "the whole body was wavy;" that his car "was damaged beyond repair." He further testified that he was traveling east on 83d street in the center lane: that the pavement was slippery and at the curb was full of water; that as he approached St. Lawrence avenue he was traveling about twenty-two to twenty-four miles an hour: that his car was equipped with an overdrive that becomes operative when the speed is in excess of thirty-five miles an hour and that the overdrive was not operative at the time of the accident; that he did not use the overdrive in the winter time (the accident occurred on December 26); that as he approached St. Lawrence avenue his car was in third speed; that after he got to the intersection he noticed plaintiff's car: that it was then a few feet south of the sidewalk line, if there had been one there; that he did not know how fast plaintiff was going at the time; that there were no curbs on St. Lawrence avenue south of 83d street at that time; that when he saw plaintiff's automobile it was traveling in a northerly direction in St. Lawrence avenue: that defendant was then on the sidewalk line and he continued to look over the intersection; that the two automobiles came together on the east part of the intersection; that plaintiff's car was then on the east side of St. Lawrence avenue and defendant was south of the center of 33d street; that when the two cars came together defendant applied his brakes and his car around skidded, the back end swung/toward the north; that plaintiff's car sort of caromed off from the front of defendant's car and continued on north; that the front part of plaintiff's car went over the side-

that that was the last thing he remembered until is "was waking up on a strange emergency table in a hospital:" that defendant's -viring polyari bed are allitatiale eline tool of belevent bed ase five or forty feet, Ibeterraphs of the two sutemobiles introduced thei ent no mourte as a real fillinials out tent went sometive at side, just back of the front fender; and that the frame of plaintiff' successive was bent inversely about fourteen inches. inor and to due dead howor and tradices said tedte dead belilitest the remain and bear the the the trans bear as and to bnoved becamed asw" use sid tadi ": vvew asw veod elokw edi" fadi bfC no jese guilevert can en tent belitteet redfrei eH ". rieger ts bus greatle caw incheved ent tant fenal retues ent ul feere the curb was fall of water; that as he approached St. Lawrence avorm tait : weating about twenty-two to trenty-four miles as hour: that near well-range account that with even his disks benefits out the also the speed is in excess of thirty-flye miles an hour and that the ed tait time act the cime of the contrary of on the every time of because of decline and) emit refer out all evidence and ere fon bib on December 26); that as he approached Bt. Lawrence averne his car was in third speed; that after he got to the intersection he noticed plaintiff's car: that it was then a few feet south of the sidewalk lime, if there had been one there; that he did not know how fast plaintiff was going at the time; that there were no curbs on St. Lawrence avenue south of 83d street at that time: that when he saw pi noiteerib virentren a ni gatievert asw it elidemotus a'llitalisiq it, is went a venue; that do raident and then on the absence item and he continued to look ever the intersection; that the two automobiles came together on the east pert of the intersection; that plaintiff's car was them on the east side of St. Lawrence avenue and defendant was south of the center of 83d street; that when the two cars come together detweether applied his breiter and his car sicklose, the brok end a ung/vomme the corthy that plaintiff's car beneigned but you at making to be subtle out more The bally no Te Jica on north; that the front part of plaintiff's car went over the side-

walk on the mortheast side of the street and over a retaining wall into a lawn, where it rested against a tree; that defendant was about fifteen feet from plaintiff's car when he applied his brakes: that he did not see claimtiff's car slacken or change speed; that after the collision defendant's car rested practically in the spot where the collision occurred; that the rear end of defendant's car had swang around and the car was facing southeast: that defendant got out of his car and went over to plaintiff's car and saw plaintiff slumped the over against / window. Upon cross-examination defendant testified that when he first saw plaintiff's car he, defendant, was only a few feet away from the intersection; that at that time plaintiff's car was probably about ten or twelve feet south of the intersection: that defendant was then traveling about twenty to twenty-four miles an hour; that from the time that he first saw plaintiff's car to the time of the collision he, defendant, traveled approximately twentyfive feet; that "the left front of Dr. Hodges' car came in contact with my car;" that at the moment of the impact he did not know how fast plaintiff was traveling, but that he, defendant, "must have been traveling very slowly;" that at the time of the impact he, defendant, was traveling "maybe five miles an hour." Defendant further testified that he had stated to a person who called upon him that when he first noticed plaintiff the front end of his, defendant's, car was just east of the west curb line and that he saw plaintiff coming there; that he was familiar with the intersection. John C. Ingraham, called by plaintiff, testified that he reached the intersection right after the accident and saw plaintiff's car leaning upon a tree in the front yard of a residence at the northeast corner of the intersection; that defendant's automobile was facing west and "close to even with the St. Lawrence curb line, that is the east curb line, extended across 83rd Street;" that it had drizzled a bit that day but it was not raining or drizzling at the time of the accident; that 83d street is a four-lane highway and St. Lawrence avenue, an ordinary street about twenty-five feet wide; that there was no stop sign on St. Lawrence avenue as you approached 83d street from the south, but

Ilaw gainister a reve hus feeris oil le abie fasediron oil no allaw asw Jushweleb ted; seems a Jenisga beteen ti erens . wal a offic sexard aim beilegs on norw the allithining mort feel mostlit twods that theese eament or medicals as a latitude see for bib en that toge out in interest before are a transfer on its leading and retle where the collision occurred; that the rear end of defendant's car had suo for inshealsh fold (fassalines anien) saw iss saft has butors gains because Thistical was hos use a Thistakale of neve they has use and to over springs theter, Upon arone-erasing its establish smelling wer a yluo asw ,inches es ne as a res elittilis was part on men the res a litting of the transferion; that it is the transferior and respectively. was probably about ten or twelve feet south of the intersection; that defendant was then traveling about twenty to twenty-four miles au edi of rac a'llifulaiq was faril ed fedt emit edt mort fadt grued time of the collision he, defendant, traveled approximately twentyfive feet; that "the left front of Dr. Modges' car came in contact noes even June ,Jacksone , on Jest Jid , unlievers are billulate fact travaling very slowly;" that at the time of the impact he, defendant; was traveling "maybe five miles on hour." Defendant further testified tarif ad madw fadf mid moga belies onw neared a of betata bed an fadf jeso jeut sem 120 's juspuso of the transfer and ilititated position tant ;erent grimos Wilnield was on tent bue entl drus teew ent lo he was familier with the intersection. John C. Ingraham, called by and restiff the tripled that he reached the intersection right after set as scoident and saw plaintill's car leaning upon a tree in the front yard fadf tactions at the northeast corner of the intersection; edf djiw neve of eaclo" bus jaew gales? asw elidomojus a'jusbueleb St. Lewrence curb line, that is the east curb line, extended across Jon one il jan vob Juli ild a belinilab bad il Juli "1700016 but 0 raining or drivaling at the time of the accident; that 83d street is a func-last highway and Dt. Lawrence evenue, on ordinary street about twenty-five feet wide; that there was no stap sign on dt. Livrince avenue as you approached 83d street from the south, but there was a light post or stop sign or something like that which had been knocked down on the south side of 83d street; that when plaintiff was first brought to the car of the witness he was uncomscious but that he regained consciousness when about half way to the hospital at a point a couple of miles from the scene of the accident.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff, The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297. See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 III. App. 586, 587.)

Applying the law bearing upon the motion to instruct the jury to find for the defendant to the evidence, it is obvious that there was evidence fairly tending to prove plaintiff's complaint.

"!* * Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence. (Petro v. Hines, 299 lll. 236, 240. See, also, Pollard v. Broadway Central Motel Corp., 353 lll. 321, 322, 323.)" (Thomason v. Chicago Motor Coach Co., supra, p. 110.) The jury were fully warranted in finding

there was a light post or stop sign or semething like that which had been knocked down on the south side of Sid street; that when plaintiff was first brought to the car of the witness he was unconscious but that he regained consciousness when about half way to the hospital at a point a couple of wiles from the scene of the notificant.

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from the evidence that when plaintiff reached the intersection defendant's car was then 200 to 250 feet west of the intersection; that plaintiff exercised ordinary care as he approached the intersection and started to cross it; that plaintiff entered the intersection before defendant reached it; and that defendant, under the circumstances, was guilty of negligence in driving his automobile at a high rate of speed on a slippery asphalt pavement as he approached and entered the intersection. They were further justified in finding that defendant traveled between 200 and 250 feet while plaintiff was traveling approximately thirty-five feet. Defendant's evidence shows that although he applied his brakes at the curbing on the west side of St. Lawrence avenue, the speed of his car was so high that the impact when his car struck the left side of plaintiff's car not only badly damaged plaintiff's car but damaged defendant's car beyond repair, and plaintiff's automobile was driven, by the impact, into the yard on the northeast corner of the intersection. Plaintiff saw defendant approaching when the latter was between 200 and 250 feet away from the intersection, and the jury were fully warranted in assuming that defendant saw plaintiff as the latter approached and entered the intersection in ample time to reduce the high speed of his car and thus avoid the collision.

We find no merit in the contention of defendant that the judgment should be reversed because the verdict of the jury is against the manifest weight of the evidence. After a careful consideration of all of the evidence, including that bearing upon the condition of the two automobiles after the impact, we are satisfied that the jury were fully warranted in finding a verdict for plaintiff. Defendant also argues in his brief that the verdict of the jury is not supported by a preponderance of the evidence. The question of preponderance of the evidence does not arise in this court. We cannot disturb the finding of the jury unless it is clearly against the manifest weight of the evidence.

Defendant has had a fair trial and the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur-

from the ovidence that when plaintiff reached the intersection defendant's car was them 100 to 250 feet west of the intersection: that plaintiff exercised ordinary care as he appreached the inver--relai end bereins littaisig tedt tit erere et hetrete bas acitose section before defendent resulted it; and that defendent, under the circumstances, was guilty of merligance in driving his guiomobile at a high rate of speed on a slippery asshalt payenent as he appropriate and entered the Interesting, They see Carling land, jeel to Tinding that defendent traveled between 200 and 250 feel while plainted was Traveling approximate thirty-fine last, Defendant's evidence shows that although he applied his brakes at the ourbing on the west side of St. Lawrence evenue, the speak of that that that the impact who his our struck that the The I'll tout als be sent without they you may b'T' brutain to obtain -efus a'llilitate dan reser beyond resellillilitate demend by mobile was driven, by the impact, into the yard on the northeast server of the intersection. Plaintiff see defendant approaching -retain and mora year seel old bas cos mesmied are rettal odd medw -brole John and are all lefters alfor the Trut of the emilena -retail ent beretae bas benearage rettel ent es Thinkelq was tas sudd has car and to been a sight of reduce to and the min section avoid the collision.

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Discult court of Cook county is affirmed, manager at theme.

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I. D. OPAT, Appallee,

V.

CITY OF CHICAGO, a Municipal Corporation, APPEAL FROM CIRCUIT COURT,

307 I.A. 671

AR. JUSTICE SCANLAR DELIVERED THE OFFICE OF THE COURT.

Plaintiff sued to recover damages for personal injuries sustained in a sidewalk accident. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at \$1,100. Defendant appeals from a judgment entered upon the verdict.

Wefendant raises no point on the pleadings, Flaintiff claimed that he sustained certain injuries because the City negligently and carelessly permitted and allowed the sidewalk on the west alde of Louth Recime avenue, at a point approximately six inches, more or less, south of the south ourb line of lest ald street and four feet, more or less, west of the west ourb line of bouth Macine avenue, "to be and remain out of repair, worm, broken, cracked, depressed, with a hole or cavity therein, dangerous and unsafe for travel thereon, all of which facts the defendant *** know, or in the emercise of ordinary care should have known in sufficient time to have repaired and remedied the same" before the accident to plaintiff; that by reason of defendant's said negligent consuct, while plaintiff was passing upon, along and over the said sidewalk and while he was then and there in the exercise of ordinary care for his own a fety and as a result of the said condition of the sidewalk, plaintiff tripped, stumbled, was thrown and fell to and upon the ground with great force and violence; that he thereby sustained certain injuries alleged in the complaint.

after the verdict of the jury was returned plaintiff discharged his attorney and the trial court entered an order upon defendant to serve notice of all motions on plaintiff. Flaintiff, a laysan,

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There is not the slightest merit in this appeal. Plaintiff introduced evidence that showed clearly that the sidewalk at the place in question at the time of the accident was so broken up and out of repair that it was dangerous and unsafe for pedestrians to valk thereon. Kennoth Frather, who lived on the lot next to the corner in question, testified that this condition had existed for rive or six years. Defendant made no attempt to contradict the lestimony introduced by plaintiff as to the condition of the sidewalk. In fact, counsel for defendant agreed that certain photographs offered by plaintiff might be introduced without objection. photographs show clearly how badly broken up and dangerous the sidewalk was at the place in question. Plaintiff testified that he resided at 5530 Fouth facine evenue; that he very seldon had occasion to go south on macine avenue and that he could not recall that he ever noticed the defective condition of the sidewalk at the place of the accident; that on September 14, 1937, between the hours of B and Bill p.m., he left his home and walked south on the sidewalk on the west side of Lacine avenue; that when he reached old street and Racine avenue he turned to cross over old atreet and while he was still on the sidewalk it "unisrowed" unior his and he stumbled and fell; that

Thoras is not the silibirat merit in this storal by lightthe bilayente and tests also also aswards that executive hereburget 1715 granisal on are inclined and to entract to notifers at early tall es and country that it was dangerous and one for for adaptional to talk throward, the mostly training who lived on the let count to the and had been contributed while the contributed and the manufactured and the contributed and the contribute Plan or six years. entre entre entre entre en entre en la militaria ulpreparel seets a full brogge Induiting to Lineaus star all aller and , and signification is a first of the distinct of figure and the first of the collection of the co -this mit accompanie from the amoint of that well also so a subject and a subject to the subject of the subject well out at the place in question, statetiff testified that he realised at 1930 leath hetter swrater limb to very seiden had connict ove od Indi Ileovy den blime od dedi bus rureve enioud na diluce 🥡 📦 and the manife will be allowed by with the maddlesses, artifeeting and deciding and her it is dependent by 1939, between the bette of I and the from our or nimence out to these butter into out the first of other winch the dwords his bedoner of atthe \$ it presers establish of around be turned to erose over 614 elevet and while he was will an folk file's has bolimps of how ald point "Lovergoine" 33 diameter of

he twisted his right ankle and hart his left allow, and remained where he had fullen; that ar. Frather and a few other are lifted him from the sidewalk and placed him on the stairway at 5.02 couth lastine evenue, and about twenty minutes thereafter Frather took him to the demrotin hospital, where he remained for about four weeks. Frather testified that he did not see plaintiff fall, but he new his when he was "down on the sidewalk and there were other people around there;" that plaintiff was growing and second to be in pain; that plaintiff could hardly move one of his legs; that he took plaintiff to the secretic hospital. Defendant offered no evidence as to the satisfant.

Defendant contends that the trial court error in refusing to give the following instruction offered by it: "The jury are instructed that the City is not liable for latent or unseen defects in the sidewalks which are not discoverable by the enercise of reasonable care, and if you believe from the evidence in this case that the sidewalk in question was, at the time of the alleged accident, in a reasonably safe condition so far as it was discoverable by the exercise of reasonable care, then you should find the defendant, the City of Chicago, not guilty, disregarding all other questions." The trial court very properly refused to give the instruction, upon the ground that it had no applicability to the facts of the case.

There is no merit in defendant's contention that the evidence failed to show that plaintiff was in the exercise of due care
and saution for his own safety at the time of the injury and that
therefore the motion by defendant for a directed verdict in its favor
should have been allowed. Under the undisputed facts in the case it
was for the jury to pass upon the question of contributory negligence.
"The general rule is that negligence and contributory negligence are
questions of fact for the jury, and so long as a question remains
whether either party has performed his legal duty or has observed that
degree of care and coution imposed upon him by law, and the determination of the question involves the veighing and consideration of evi-

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dense, Use question must be submitted as one of fact, (Chicaro, at. Louis and Fittsburg Railroad Co. v. Matchinson, 130 111, 587: dustin v. rublic Service Co. ante, p. 112.) Defore we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such scattributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own ne ligence. (Petro v. Mines, 299 Ill. 236, 240, dem, also, Pollard V. Transvay Control dotal Corn., 353 111. 312, 322, 323.)" (Thornson v. Thicage Motor Coach Co., 192 III. app. 104, 110.) The jury were fully instructed on the subject of contributory negligance and by their verdist they found that plaintiff was in the exercise of ordinary cars. Under the facts it is clear that we would not be justified in holding that all reasonable minds must agree that plaintiff was not in the alergise of due care and caution for his own safety at the time of the accident.

The last contention of defendant is that the evidence fails to disclose that the injuries claimed to have been sustained by plaintiff were caused by the accident in question. Upon his direct examination plaintiff voluntarily testified that he had had several accidents prior to the one in question and that he sustained injuries in each of them. It is upon this evidence that plaintiff bases the instant contention. Defendant does not content that the damages standed are excessive, and it is very clear that they are not. Plaintiff paid the Demotin hospital \$167.57. Dr. John 1. Oraham, she attended him at the Hemrotin hospital \$167.57. Dr. John 1. Oraham, she attended him at the Hemrotin hospital and after he left the hospital, rendered plaintiff a bill for \$367. The jury assessed plaintiff's damages in the sum of \$1,100. The amount allowed plaintiff for his injuries was only \$545.43. Plaintiff has been for many years "a post operative mechano therapist." He works for desions and after an operation has been perfermed upon a patient his work is "to loosen up the suscless and permit

nightty ... , had in our at heatfame of from patrons my passet and all all more than the second seco THE COMMERCE WAS ASSESSED. THE PARTY OF PARTY AND ADDRESS OF PARTY OF PARTY OF PARTY OF PARTY OF PARTY. a satter of levy that there was no negligance on the pert of the from all as consilient questibution dest one could dest no Arientalab indi you of this of lane, or fyrevers furfiched to This bely said to desight from from him design to the could be all controls about the about the could be also as the could be also a are a "Thichials in always and our yould not duly us upon and at regularization of thereto and the title title to the other building and the state of the state of the same of the factors, were not the Ye Allows Later County Co., . 92 111. . 17. 110.) In Jury were filly instructed on the subject of searchies of melections and by until to to calculate oil the any britistals dute here's pair dalbary aloid at halling of ica line to gain table at the foot oil when . even for any Thirtely dade being some about elementar lie fait gathfold and the substitute of this cuts this monthless the bids not noticing at the JERNALDINE WAY TO BEEN

tiff were camera by the considert in question, by a direct examinable plainties plainties in hed hed hed several society pulse to the plainties in hed hed several society pulse to the the testional injuries in each color time to the majorite in the injuries in hed in another of them. It is upon this evidence that, jointiff become the head in the successful integral and the very class that they are set, Flaintiff poid the extension bits at the hill for \$137.37. In fury assessed plaintiff for him is in the sum of \$1,100. The enterm allowed plaintiff for his injuries was only and of \$1,100. The enterm allowed plaintiff for his injuries was only and the transfer was only continued upon a patient the work is "to leaven up the market and parties."

Constioning," by John L. Fraham, the treated plainting after the accident, testified that when he saw plaintiff, about 913 ofclock of the evening of the accident, he found that plaintiff had an injury to his right soble; that the souls was markedly spoiler, painful and rigid; that there was an injury to plaintiff's left arm and to his left shoulder, and he alse found minor body bruises. The doctor further esstified that the injury to the ankle affected the tenions or the soft thouse and that it took some time for this trouble to clear up, but he thought that it was cleared up at the time of the trial. We further testified that he could an lersy photograph of plaintiff's left wibow to be made and that the photograph showed a comminated fracture of the inner condyle, otherwise called the "Tunny bone;" that there is now a union of the sinces of mone. although some of the fragments are slightly displaced. The doctor further testified that in his epinion the injury to plaintiff's albow is permanent. Plaintiff testified that for some years prior to the assident he had a hermia but that it did not bother him before the socident and it was not necessary for him to war a truss. Thile plaintiff was in the hospital Dr. Graham found that the hermia had become decidedly aggravated and required an operation, and he performed one on September 27, 1937. Flaintiff testified that after he fell to the sidewalk he felt a pain in the right ankle, pain in his elbow, and a severa pain ever the left side of the intestines. . laintiff contends that the accident aggravated his hernia, but in our view of the ascent awarded plaintiff this particular claim may be entirely disregarded. Plaintiff gestified that it was not until a year after the accident that he was able to do a little work; that he is still quable to handle cases involving ankylosis of the kness because of the injury to his elbow. The doctor also testified that he brosted plaintiff from the time the latter entered the hospital until may 5, 1938. Or. Graham has practiced his profession in Chicago for a great many years. He is the chief surgeon of the Senretin Lasgital and is

tally march thirtains see every min analysis at mine and a palantronet destrive wish suchs aluterising was of main soil hollbrook anchious quoini no and likedels dail boost of Inches of le univers of he has laming profitor plonies and sides all told points distracted of which the one was their chitching of their or one work their titleto thing out - ... and the also frame about bedy braines, the decision that Boulder and industry where our as wented and said heliktres redicted of the ent them and that it took amon that for this remain to cit to enti one to an evente can it init injured of ind any coals uses in indice testified their he comen on lessy portegraph of a hearon's signification of the state of the coll heline coleratio alphas sout mi le cunteral helichance "finny hone;" that there is now a union of the places of bone; although som of the Praguets are allered; the Landauet, the desire Cortine Destilled that is his spinion the Coping to plaintiffly allow is personent, Paintell testified that for one years point to the add evolve mid verices see his 21 sail too alarmi a had ad Jestiona nerident and it was necessary for him to rune a trick. pinistiff and in the handled Mr. Spoke Court that the besting the mental destination appropriate and revision on equipmental value of of the servery and participal Thindall . The telescope is not tion eddennia he relt a pain in the right colles poin in his elicon and a severy pain ever the left that the intitues. This till In which was not red entered that before any such that the such the such as the such that the such t the second specifical title period calculation behaves become This tage a film doe now it fall believe Timing Tilta al od Jair járma alitil a ob of mido som od fadi focili - - to essentia acous ati to cluelyine pairformi escas efficial of oldens the tellury be his elbow. Her dealer also beatified that he troubed plaintiff from the time the Labies entered the haspital until helf is lyll. In, drainen han practiced his prefereion in Chienge for a grant all key full pool and reach man be progress below one all oil univers types

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on the whalf of the Children's Demorial hospital and the Illinois Central capital. In our juigment, defendant should be well satisfied with the encount of the damages awarded by the Jury and plaintiff with very justly complain of the amount of the verdict. The small amount awarded was due, in our opinion, to the character of the argument made by defendant's counsel to the jury. He called plaintiff "an ordinary fraud, a faker, a charlatan," and lo acqueed plaintiff and "his friend Dr. Graham" of building up a game "from start to rinish - with one avowed purpose, and that is to stick the City." He stated that the alleged accident was a fraud and the alleged injuries, a build-up; that ofter the pretonica accident laintiff went to his friend Dr. Graham becomes he know the sector had a convenient among and would do averything in the world to belp plaintiff in the case, The only defense that defendant offers to this vicious and unjustified argument is that plaintiff's attorney made no objection to any part of it. It is true that plaintiff's attorney was dereliet in this regard, and we alto the argument because it seems to be the only likely explanation of the inadequate amount of damages awarded plaintiff.

The judgment of the Circuit court of Gook county is affirmed.

JUDGERNY AFTERDA

Friend, P. J., and Sullivan, J., concur.

aloughli ods has istipped introduce a modified and the Maste wit as lies of Alson Jacksein, incapital are al . fafigued foring nething with the amount of the damages everyon by the fury, and Jaikrev ext to James wit to minimum vilual very Juli- Tiluthing definition of an indicator the off the charge of the charge of believed and all as frames a temperate the large frames at the plaints? "on setting fresh, a fring, a chartery," on he seminal profit our a up painting to "maked" ou health and the Williams cieft to Finish - with one evened purpose, and that is to stick the city." He stated that the sileged accident our a front and the insites a behades out to the time satisfies a sectorial baselies The time to the interior of the decime became be know the decime give of bines out all painty seve of bines for yroness teats si suchi in the data one he del one the differentials of paracts of thickness that as community to this and an abstract while gilliphele Judi erut at il . if to fare the es maischde on char ationny see destited in this requel, and we alto the augment. because it seems to be the only likely expendion of the inviounts 49 bimbola Asimous absorbed to bosons

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. SERVICE DESIGNATION .

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REGINALD V. DUCKETT,
(Plaintiff)

Appellee,

CHICAGO AND WEST TOWNS RAILWAYS,
INC., a corporation SIRO GMILARDI,
LOUISE GHILARDI and SOPHIE ENDREWS,
Defendants.

SUPERIOR COURT OF

LOUISE GHILARDI,
(Defendant)

Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Louise Ghilardi, appellant, and others, for damages growing out of a collision between plaintiff and the automobile of appellant. The accident occurred at the intersection of 52d avenue and 22d street in Cicero, Illinois, on December 28, 1937. As a result of the accident it was necessary to amputate the right leg of plaintiff. Before the trial of the cause plaintiff dismissed the suit as to defendants Sirb Ghilardi and Sophie Andrews. At the time of the trial of the cause plaintiff dismissed the suit as to defendant Chicago and West Towns Railways Company, Inc. A jury returned a verdict finding Louise Ghilardi, defendant, guilty and assessing plaintiff's damages at the sum of \$2,500. Defendant appeals from the judgment entered upon the verdict. Plaintiff, appellee, has not filed a brief in this court.

The accident occurred about 2:30 a.m. Plaintiff had been visiting a lady friend in Chicago and left her after midnight. He then took a street car that took him to the northeast corner of 52d avenue and 22d street, in Cicero. He got off of the car on the northeast corner of the intersection of said streets in order to take a bus of the Chicago and West Towns Railways, Inc., which would take him to his ultimate destination. The busses of the Chicago and West Towns Railways, Inc., traveled west on 22d street until they reached

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said intersection, where they made a left turn and proceeded south on 52d avenue. Plaintiff testified that he stood on the northeast corner for about twenty minutes before a bus pulled up to the intersection; that when it reached the intersection he waived to the bus but that before he could reach it he was struck by the automobile of defendant: that before he started for the bus he looked to the left and did not see any automobile but he thought that he heard one: that, as to the lights at the intersection, he "looked and there were no lights there. They were not operating and when they did operate, they stayed green all around. I did not see any stop and go lights." The theory of fact of defendant was that plaintiff was not standing at the northeast corner of the intersection when the bus reached the intersection; that the bus reached the intersection and stopped; that the lights were operating properly before the accident and at the time of the accident: that when the bus reached the intersection the east and west lights were red; that when the east and west lights turned green the bus started to make a left turn on 52d avenue, that as it was making the turn plaintiff rushed from the sidewalk in order to catch the bus and that as he was rushing for the bus he was struck by defendant's automobile, which was proceeding westward on 22d street with the green light in its favor, and that the movement of plaintiff from the sidewalk to a point in front of defendant's automobile was made so quickly that defendant had no opportunity of stopping the automobile in time to avoid the accident; that defendant stopped her automobile and took plaintiff to the hospital.

Defendant strenuously contends that the accident was occasioned solely through the negligence of plaintiff and that defendant was guilty of no negligence whatsoever; that plaintiff failed to make out a prima facie case against defendant and that therefore the trial court erred in failing to instruct the jury to find defendant not guilty on defendant's motion, made at the close of plaintiff's testimony, and also a like motion made at the close of all of the

said intersection, where they made a left turn and proceeded south on 52d avenue. Plaintiff testified that he stood on the northeast corner for about twenty minutes before a bus pulled up to the intersection; that when it reached the intersection he waited to the bus lo efficient and the contract if he was struck by the national land fiel end of tendent; that role betreet and erorest that the leafendant eno brase on jed throat on the elicomous yes see ton bis bas that, as to the lights at the intersection, he "looked and were no lights there. They were not operating and when they did operate, they stayed grown all around. I did not see any stop and no lights," The theory of fact of defendant was that plaintiff was not standing at the northeast corner of the intersection when the bus reached the intersection; that the bus reached the intersection and stopped; that the lights were operating properly before the secisers and at the time of the sectiont; that when the bus reschent the intersection the east and tree lights were that when the must fiel a odem of betwee and odd meers benust sidell frew bas tess on 12d avenue, that as it was making the turn plaintiff rushed for the sidewalk in order to catch the bus and that as he was realing -orq as which was struck by defendant!s automobile, which was prodecing westward on 22d street with the green light in its layer, and fuori mi julog s of Alswebla edf mort lithinisis to Jesus wood and Jadi of defendent's automobile was made so quickly that defendent ind no opportunity of stopping the automobile in time to avoid the accident; out of Tritalely wood has elicomotus and begons the defendant alaragami.

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occasioned solely through the negligence of plaintiff and that defendant was guilty of no negligence whatsoever; that plaintiff failed to make out a prime facte case against defendant and that therefore the trial court erred in failing to instruct the jury to find defendant not guilty on defendant's motion, made at the close of plaintiff!s

evidence. The argument in support of this contention is not without some force, but, following the well-established rules that govern motions to direct a verdict, we have reached the conclusion that we would not be justified in holding that the trial court erred in failing to direct a verdict for defendant.

Defendant contends that in any event it must be held that the verdict is contrary to the manifest weight of the evidence. This contention is clearly a meritorious one and must be sustained. We agree with defendant that it is difficult to understand how a fair and intelligent jury could have reached a verdict for plaintiff under all of the evidence in the case. There is merit in defendant's argument that the amount awarded plaintiff, \$2,500, is such inadequate compensation for the loss of a young man's right leg that it is apparent that the verdict was "a sympathy verdict not predicated upon the evidence, but a desire on the part of the jurors to give to the plaintiff some compensation for his serious injury." The evidence shows that plaintiff's hospital bill was \$230, his doctor's bill was \$150, and the cost of an artificial leg was \$76, so that it appears that the jury awarded plaintiff only \$2,044 for the loss of his leg. After the evidence in this case has been carefully considered it is not difficult to understand why plaintiff has not seen fit to defend the instant judgment.

It would be a grave injustice to defendant to permit the instant judgment to stand, and it is accordingly reversed, and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

evidence. The argument in support of this contention is not without some force, but, following the well-established rules that govern motions to direct a verdict, we have reached the conclusion that we would not be justified in holding time the trial court arred in failing to direct a verdict for defendant.

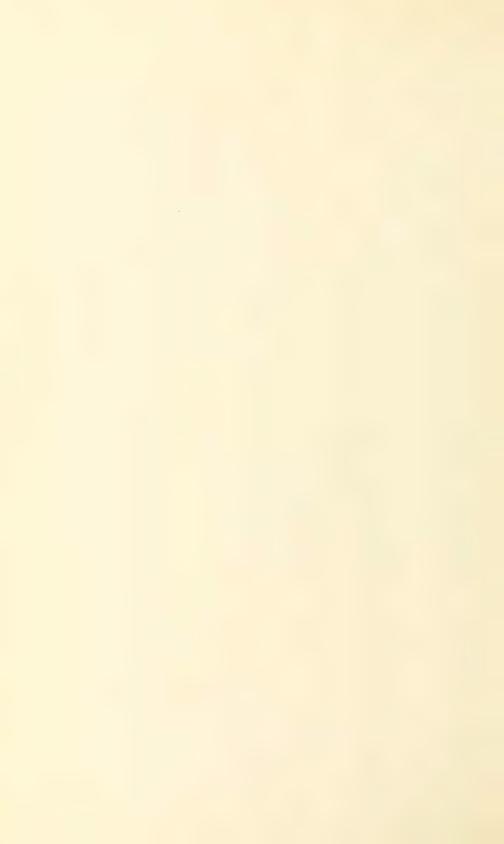
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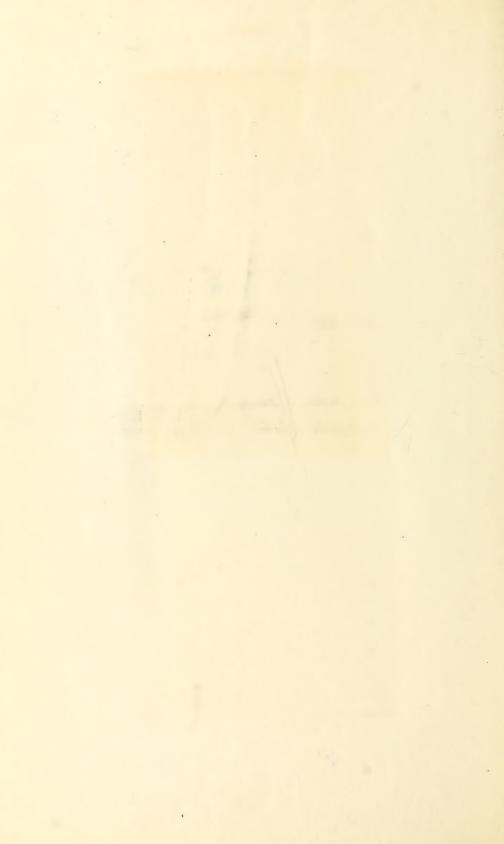
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Friend, P. J., and Sullivan, J., concur.









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